(9)

No. 01-1500-CFY Title: Erick Cornell Clay, Petitioner
v.
United States

Docketed: April 15, 2002 Court: United States Court of Appeals for the Seventh Circuit

Entry	Date	Proceedings and Orders
	Jan 13 2002	ARGUED.
	Apr 5 2002	Petition for writ of certiorari filed. (Response due June 14, 2002)
	May 7 2002	Order extending time to file response to petition until June 14, 2002.
	Jun 7 2002	Brief of respondent United States in opposition filed.
	Jun 11 2002	DISTRIBUTED for Conference of June 27, 2002
	Jun 13 2002	Reply brief of petitioner Erick C. Clay filed.
	Jun 28 2002	Petition GRANTED. limited to the following question: Whether petitioner's judgment of conviction became "final" within the meaning of 28 U.S.C. 2255 para. 6(1) one year after the court of appeals issued its mandate on direct appeal or one year after his time for filing a petition for a writ of certiorari expired. SET FOR ARGUMENT January 13, 2003.
		**********
	Jul 9 2002	Motion of the Solicitor General to amend the order granting the petition for a writ of certiorari and stating the question presented filed.
	Jul 29 2002	David W. DeBruin, Esquire, of Washington, D.C., is invited to brief and argue this case, as amicus curiae, in support of the judgment below.
	Aug 5 2002	Order extending time to file the joint appendix and petitioner's brief on the merits to and including September11, 2002.
	Aug 26 2002	Motion of the Solicitor General to amend the order granting the petition for a writ of certiorari and stating the question presented GRANTED. The order granting the petition for a writ of certiorari is amended to read as follows: The petition for a writ of certiorari is granted limited to the following question: Whether petitioner's judgment of conviction became "final" within the meaning of 28 U.S.C. 2255, para. 6(1) when the court of appeals issued its mandate on direct appeal or when his time for filing a petition for a writ of certiorari expired.
	Aug 30 2002	Motion of petitioner for appointment of counsel filed.
	Aug 30 2002	Motion of petitioner for leave to proceed further herein in forma pauperis filed.
	Sep 4 2002	Motion of the Solicitor General to dispense with printing the joint appendix filed.
	Sep 11 2002	Motions DISTRIBUTED. September 30, 2002 (Page 162)
	Sep 11 2002	Brief of respondent United States filed.
	Sep 11 2002	Brief of petitioner Erick Cornell Clay filed.
	Sep 12 2002	Consent to the filing of all amicus briefs in support of either party received from counsel for the petitioner.

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No. 01-1500-CFY

Entry	Date	Proceedings and Orders
	Sep 22 2002	Order extending time to file brief of amicus curiae, in support of judgment below to and including November 14, 2002.
	Oct 7 2002	Motion of petitioner for leave to proceed further herein in forma pauperis GRANTED.
	Oct 7 2002	Motion for appointment of counsel GRANTED and it is ordered that Thomas C. Goldstein, Esquire, of Washington, D.C., is appointed to serve as counsel for the petitioner in this case.
	Oct 7 2002	Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
	Nov 4 2002	Motion of the Solicitor General for divided argument filed.
	Nov 14 2002	Brief amicus curiae of David DeBruin in support of the judgement below filed.
	Nov 21 2002	CIRCULATED.
	Dec 11 2002	Record filed.
	Dec 16 2002	Motion of the Solicitor General for divided argument GRANTED.
	Dec 16 2002	Reply brief of petitioner Erick C. Clay filed.
	Dec 16 2002	Reply brief of respondent United States filed.
	Dec 23 2002	Record filed.
	Jan 13 2003	ARGUED.

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. 01-___

IN THE

Supreme Court of the United States

Erick Cornell Clay,

Petitioner,

v.

United States of America.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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April 5, 2002

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QUESTION PRESENTED

A federal prisoner generally must file a post-conviction motion under 28 U.S.C. 2255 within one year of "the date on which [his] judgment of conviction becomes final." In cases in which the defendant loses on direct appeal but does not seek certiorari, the circuits have divided over the meaning of "final," a term not defined by the statute. As the government explained on appeal in this case, "[Petitioner] argues, and the Solicitor General agrees, that his judgment of conviction did not become final until the time for filing a petition for a writ of certiorari had elapsed." The Seventh Circuit nonetheless adhered to its contrary precedent, which holds that a conviction becomes "final" when the mandate issues on the defendant's direct appeal, and reiterated its refusal to revisit the issue "notwithstanding the circuit split." The Seventh Circuit specifically declined to overturn its settled rule "without guidance from the Supreme Court."

The Question Presented is:

Is a conviction "final" for purposes of 28 U.S.C. 2255 when (i) the appellate mandate issues on direct appeal (as the Seventh and Fourth Circuits hold), or instead (ii) when the defendant's time to petition for certiorari expires (as both Petitioner and the federal government argued below and as the Third, Fifth, Ninth, Tenth, and Eleventh Circuits hold).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Erick Cornell Clay respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW AND JURISDICTION

The opinions of the Seventh Circuit (Pet. App. 1a-6a) and district court (*id.* 7a-9a) are unpublished. The court of appeals issued its opinion on January 25, 2002. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISION

28 U.S.C. 2255 provides in relevant part: "A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—(1) the date on which the judgment of conviction becomes final; * * *."

STATEMENT

1. A federal prisoner generally must file any motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255 within one year of "the date on which the judgment of conviction becomes final." 28 U.S.C. 2255. The motion must be filed in the judicial district in which the prisoner was convicted. *Id.*

2. On Petitioner's direct appeal in this case, the Seventh Circuit affirmed his conviction for arson and distribution of a Schedule II substance on November 23, 1998. No. 98-1783, 1998 U.S. App. LEXIS 30134 (Nov. 23, 1998), *reported at* 165 F.3d 33 (table). The court of appeals issued its mandate on December 15, 1998. The deadline to file a petition for certiorari was February 22, 1999. Petitioner did not seek certiorari.

Petitioner filed nis *pro se* Section 2255 motion on February 22, 2000 – *i.e.*, exactly one year after the time to file for certiorari expired but a year and sixty-nine days after the mandate issued on his appeal. Petitioner is incarcerated in

Tennessee and filed his motion in the Northern District of Indiana, where he was convicted. Petitioner alleged, *inter alia*, that his trial counsel was constitutionally ineffective and that the indictment was defective.

The government acknowledged that the motion was filed too late under the Seventh Circuit's holding in *Gendron* v. *United States*, 154 F.3d 672 (1998) (per curiam), *cert. denied*, 526 U.S. 1113 (1999), that, in cases in which the petitioner does not seek certiorari, a judgment of conviction is "final" when the court of appeals issues its mandate. But the government identified a circuit split on the question and reiterated the Solicitor General's position from prior litigation that the Seventh Circuit's rule is wrong:

> The Department of Justice * * * has taken a position contrary to the Seventh Circuit's rule * * * and has instead supported the rule in *Kapral v. United States*, 166 F.3d 565, 566 (3rd Cir. 1999), that "a conviction does not become 'final' under § 2255 until expiration of the time allowed for certiorari review by the Supreme Court." * * *
>
> By the *Kapral* analysis, Mr. Clay's 2255 Petition would be timely * * * since he filed within one year from the time that he could have sought certiorari to the Supreme Court.

Gov't's Resp. to Mem. And Order of June 21, 2000, at 1-2.

3. The district court deemed itself bound to dismiss Petitioner's Section 2255 motion as untimely. Expressly recognizing that "other courts of appeal apply a different standard," the district court held the case was controlled by the Seventh Circuit's rule that "when a federal prisoner in this circuit does not seek certiorari with the United States Supreme Court, the conviction becomes 'final' on the date the appellate court issues the mandate in the direct appeal." Pet. App. 8a.

The district court furthermore held that the existence of the circuit conflict did not justify the application of equitable

tolling, for "[w]ithout more than a missed deadline based on an assumption that Third Circuit precedent controlled courts in the Seventh Circuit, Mr. Clay cannot meet the high threshold necessary to trigger equitable tolling." Pet. App. 8a. Nor, the district court held, may a federal defendant challenge his conviction pursuant to Fed. R. Civ. P. 60(b) rather than Section 2255. *Id.* 9a.

The district court accordingly dismissed Petitioner's Section 2255 application as untimely, Pet. App. 9a, but granted Petitioner a certificate of appealability, see *id.* 3a.

3. On Petitioner's appeal, the government again acknowledged the circuit conflict and again argued that Seventh Circuit precedent was wrong:

> The courts of appeals are divided over when a judgment of conviction becomes "final" under 28 U.S.C. 2255 ¶ 6(1) in cases in which the defendant files an appeal but not a petition for a writ of certiorari. The Fourth Circuit along with this Circuit have held that the judgment in such cases becomes final on the date that the court of appeals issues its mandate on direct review. * * *
>
> Four other circuits have held to the contrary, that a conviction does not become final under Section 2255 until the time for filing a petition for a writ of certiorari expires. In the Department's view, the reasoning and conclusions of those latter circuits is correct.

Gov't C.A. Br. 18-19. See also *id.* 17 ("Clay argues, and the Solicitor General agrees, that his judgment of conviction did not become final until the time for filing a petition for a writ of certiorari had elapsed.").

The Seventh Circuit nonetheless affirmed, deeming the timeliness issue "to be dispositive of the case." Pet. App. 3a. The court of appeals "decline[d] the invitation to reconsider [its] holding in *Gendron*," although it acknowledged that "the government correctly points out that [the Seventh Circuit's]

construction of section 2255 represents the minority view." *Id.* 5a. The court noted that "[s]ince *Gendron* was decided, we have declined to revisit its holding notwithstanding the circuit split." *Id.* (citing *Garrott* v. *United States*, 238 F.3d 903 (CA7), *cert. denied*, 532 U.S. 1072 (2001); *Gutierrez* v. *Schomig*, 233 F.3d 490 (CA7 2000), *cert. denied*, 532 U.S. 950 (2001)). "Bowing to *stare decisis*," the Seventh Circuit declined "to overrule a recently-reaffirmed precedent without guidance from the Supreme Court." *Id.*

4. This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

1. The question presented is the subject of a five-to-two circuit conflict openly acknowledged by the court of appeals and the federal government. Only the Fourth Circuit agrees with the Seventh Circuit's holding that a conviction becomes "final" for purposes of Section 2255 when the court of appeals issues its mandate. The Third, Fifth, Ninth, Tenth, and Eleventh Circuits flatly disagree, holding that finality attaches when the time to petition for certiorari expires; each of those courts has avowedly rejected the Seventh Circuit's rule. Compare *United States* v. *Torres*, 211 F.3d 836 (CA4 2000) with *United States* v. *Kaufmann*, No. 00-15458, 2002 U.S. App. LEXIS 2668, at *4-*11 (CA11 Feb. 21, 2002), *United States* v. *Garcia*, 210 F.3d 1058, 1059-61 (CA9 2000), *United States* v. *Gamble*, 208 F.3d 536, 536-37 (CA5 2000) (per curiam), *United States* v. *Burch*, 202 F.3d 1274, 1276-78 (CA10 2000), and *Kapral* v. *United States*, 166 F.3d 565, 568-77 (CA3 1999). See also, *e.g.*, *United States* v. *Hicks*, No. 01-3040, 2002 U.S. App. LEXIS 4948, at *15-*16 (CADC Mar. 26, 2002) (acknowledging the split).

2. This Court's intervention is required because the circuit conflict is intractable. The Seventh Circuit has acknowledged the split but, despite the government's urging, has declined to revisit its rule "without guidance from the Supreme Court." Pet. App. 5a. In *Torres*, the Fourth Circuit similarly acknowledged that it was expanding a circuit

conflict (154 F.3d at 838-39), rejected the government's argument that it should adopt the majority rule (*id.* at 838), and denied rehearing *en banc* (Order of July 7, 2000).

3. Certiorari is also warranted because the question presented is very important. The issue can potentially arise in essentially any case in which a federal prisoner appeals but does not seek certiorari on direct review. In the year ending September 30, 2001, prisoners filed 8644 motions to vacate their sentences in federal court; 1867 were filed in the Fourth and Seventh Circuits alone. See 2001 ANNUAL REPORT OF THE DIRECTOR, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, tbl. C-3.

This case amply demonstrates the significance of the question presented. As in this case, federal prisoners frequently seek relief under Section 2255 *pro se* without comprehending the significance of the circuit conflict. In addition, as in this case, petitioners are frequently incarcerated in a different circuit than the one in which they must file their Section 2255 motion and thus have further difficulties in determining the correct rule.

The importance of the conflict is heightened because it is outcome determinative. The federal courts, including in this case, uniformly refuse to apply equitable tolling when a petitioner errs in computing the deadline and furthermore refuse to permit federal prisoners to challenge their sentences through the alternative remedy provided by Fed. R. Civ. P. 60(b). The conflict thus extinguishes the principal post-conviction remedy available to federal prisoners.[1]

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[1] The circuit conflict perpetuates the disparate treatment of similarly situated federal prisoners in other ways as well because the date on which a federal conviction becomes "final" can have important collateral consequences. For example, under *Teague* v. *Lane*, 489 U.S. 288 (1989), it may determine whether a defendant is entitled to the benefit of a new constitutional rule. See, *e.g.*, *Caron* v. *United States*, 183 F. Supp. 2d 149, 153 (D Ma 2001). In addition, it may determine whether an amendment to the defendant's initial Section 2255 motion is timely. Finally, the proper test for determining "finality" may determine the date on which a

It is therefore not surprising that *seven* different circuits have been forced to confront the question presented in recent years, conclusively demonstrating that the issue is important and frequently recurring. In addition, district courts have repeatedly faced cases in which the choice between the competing rules was outcome determinative. See, *e.g.*, *Moultrie* v. *United States*, 147 F. Supp. 2d 405, 408 (DSC 2001); *Then* v. *United States*, 126 F. Supp. 2d 727, 729 (SDNY 2001); *Kamen* v. *United States*, 124 F. Supp. 2d 603, 604 (MD Tn 2000); *United States* v. *Swinton*, No. 94-8-1, 2000 U.S. Dist. LEXIS 18726, at *7 (ED Pa Dec. 8, 2000); *Jean* v. *United States*, No. 99-cv-8702, 2000 U.S. Dist. LEXIS 7224, at *5 (EDNY Apr. 4, 2000); *United States* v. *Gurrusquieta*, No. 3-97-CR-0158P(19), 1999 U.S. Dist. LEXIS 18694, at *4-*5 (ND Tx Nov. 30, 1999), *vacated* (CA5 Order Mar. 16, 2001 (No. 00-10498)); *United States* v. *Stead*, 67 F. Supp. 2d 1064, 1071-72 (DSD 1999). In other cases, district courts have taken sides in the conflict *sub silentio*, highlighting the need for clear guidance from this Court. See, *e.g.*, *Then*, 126 F. Supp. 2d at 729 (collecting cases).[2]

4. Certiorari furthermore is warranted because the Seventh Circuit's holding is wrong, principally for two

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Section 2255 motion must be filed in cases in which the petitioner did not file a direct appeal from his judgment of conviction. See, *e.g.*, *United States* v. *Sherrod*, 123 F. Supp. 2d 338, 339 (ED Va 2000) (based on Fourth Circuit's decision in *Torres*, *supra*, holding that 10-day period to file notice of appeal is not included in determining "finality"; rejecting Eleventh Circuit's contrary holding).

[2] Even the large number of reported cases on the question presented appears to understate substantially the frequency with which the issue arises. Most of the appellate decisions, for example, arose from district court rulings that were not reported, either electronically or in published volumes. The federal government is, of course, a party to each case in which the issue arises. Therefore, if the Solicitor General intends to attempt to suggest that the question presented is not sufficiently important to merit certiorari, Petitioner respectfully requests that he identify for this Court the district court cases in which the question has arisen.

reasons. *First*, "finality" is a term of art in the context of post-conviction review that, under this Court's precedents, attaches when "the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied" (*Caspari* v. *Bohlen*, 510 U.S. 383, 390 (1994)). See also *Griffith* v. *Kentucky*, 479 U.S. 314, 321 n.6 (1987); *United States* v. *Johnson*, 457 U.S. 537, 542 n.8 (1982). *Second*, the one-year limitations period for state prisoners to seek relief under Section 2244 similarly runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review" (28 U.S.C. 2244(d)(1)(A)) and there is no reason Congress would have intended a different test to determine finality under Section 2255. The Fourth and Seventh Circuits' emphasis on the omission in Section 2255 of language expressly referring to "the expiration of time for seeking such review" simply fails to appreciate that "in a world of silk purses and pigs' ears, the [AEDPA] is not a silk purse of the art of statutory drafting" (*Lindh* v. *Murphy*, 521 U.S. 320, 336 (1997)). See generally Gov't C.A. Br. 20-23; *Torres*, *supra*, 211 F.3d at 842-46 (Hamilton, S.J., dissenting); *Kapral*, *supra*, 166 F.3d at 569-77; *id.* at 577-81 (Alito, J., concurring).[3]

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[3] The question presented was previously raised in a petition from the Seventh Circuit's *Garrott* decision. In that case, this Court remanded for further consideration in light of *Slack* v. *McDaniel*, 529 U.S. 473 (2000), because it was unclear whether the petitioner qualified for a certificate of appealability. On remand, the court of appeals concluded that the petitioner's Section 2255 motion did not present any substantial constitutional question and denied the certificate. The petitioner sought certiorari from that ruling, the Solicitor General waived the right to respond, and this Court denied certiorari. See *Garrott* v. *United States*, Order (CA7 Jan. 28, 2000) (No. 99-2921), *vacated and remanded*, 531 U.S. 941 (2000) (No. 99-9743), *on remand*, 238 F.3d 903, *cert. denied*, 532 U.S. 1072 (2001) (No. 00-9634).

In a testament to the difficulties faced by *pro se* litigants in this context, the petitioner in the Fourth Circuit's *Torres* decision attempted to seek certiorari *pro se* but mistakenly filed the petition with the court of

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 5, 2002

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appeals, which of course rejected it. No. 98-7657, Oct. 10, 2000 Dkt. Notation. He then sought an extension of time from this Court, which refused to accept the motion as untimely. See Oct. 20, 2001 correspondence (on file with the Clerk's office).

APPENDIX

ERICK CORNELL CLAY,
Petitioner-Appellant,
v.
UNITED STATES OF AMERICA,
Respondent-Appellee.

No. 00-3671

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

September 28, 2001*, Submitted

*This appeal was submitted to the panel that decided Clay's direct appeal pursuant to OPERATING PROCEDURE 6(b). Judge Eschbach, who was a member of the original panel, has since retired from service. Judge Evans has been assigned at random to replace him on the panel. After an examination of the materials submitted by the parties, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record. See FED. R. APP. P. 34(a)(2).

January 25, 2002, Decided

NOTICE: RULES OF THE SEVENTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

COUNSEL: ERICK CORNELL CLAY, Petitioner-Appellant, *Pro se*, Manchester, KY.

For UNITED STATES OF AMERICA, Respondent-Appellee: Kenneth M. Hays, OFFICE OF THE UNITED STATES ATTORNEY, South Bend, IN, USA.

Before Honorable ILANA DIAMOND ROVNER, Circuit Judge, Honorable DIANE P. WOOD, Circuit Judge, Honorable TERENCE T. EVANS, Circuit Judge.

ORDER

During the summer of 1996, Erick Clay began selling crack cocaine to Tammy Sue Herring, who was renting a room in a house in South Bend, Indiana. On October 18, 1996, in an apparent effort to settle Herring's outstanding drug debt to him, Clay set the home on fire. The resulting conflagration severely damaged the residence and killed a dog and a kitten. A federal grand jury in Indiana subsequently charged Clay with arson and distribution of crack in violation of 18 U.S.C. § 844(i) and 21 U.S.C. 841(a)(1). On December 30, 1997, he was convicted of both counts by a jury, and the district court later sentenced him to 137 months in prison. Clay appealed his conviction, arguing that the Government had not produced enough evidence to convict him on either count and that the trial judge had improperly admitted "other crimes" evidence. On November 23, 1998, this Court affirmed his convictions in an unpublished order. *United States v. Clay*, 165 F.3d 33, No. 98-1783, 1998 WL 847098 (7th Cir. 1998). Clay did not file a petition for rehearing and the mandate was issued from this court on December 15, 1998. He did not thereafter file a petition for certiorari with the Supreme Court.

On February 22, 2000, more than a year after we affirmed his conviction, Clay filed a pro se motion with the district court to vacate, set aside, or correct his sentence under 28 U.S.C. § 2255, arguing principally that his counsel was ineffective at trial. The district court denied Clay's motion as time-barred on August 2, 2000. Clay subsequently filed a

notice of appeal on September 7, 2000. The district court sua sponte issued a certificate of appealability as to whether Clay was denied his Sixth Amendment right to the effective assistance of counsel. Clay's first appellate brief was stricken by this Court because he failed to address the Sixth Amendment claim for which the district court had issued the certificate of appealability. Contrary to this Court's instruction, Clay's second brief addressed only whether the district court properly denied his motion as untimely, not the Sixth Amendment claim. As it turns out, however, we need not reach the merits of the Sixth Amendment claim. The one issue that Clay addressed in his brief -- the timeliness of his motion -- turns out to be dispositive of the case. We find that the district court properly denied Clay's motion as time-barred pursuant to law of this circuit, and therefore we affirm on that basis.[1]

---

[1] We had asked the parties to address in their briefs whether it was proper for the district court to deny Clay's § 2255 motion as untimely given that the government originally had responded to the merits of Clay's motion in the district court without raising the timeliness question -- thereby, arguably, waiving any defense based on the tardiness of the motion. *Cf. Acosta v. Artuz*, 221 F.3d 117, 122-23 (2d Cir. 2000) (holding that court may raise timeliness of § 2254 petition sua sponte); *Kiser v. Johnson*, 163 F.3d 326, 328-29 (5th Cir. 1999) (same). Notwithstanding our request, Clay did not address the potential waiver in his opening brief. Belatedly, in his reply brief, he did argue that the government waived the timeliness argument. This was too late. *See, e.g., Help At Home Inc. v. Medical Capital, L.L.C.*, 260 F.3d 748, 753 n.2 (7th Cir. 2001) (arguments first raised in reply brief are deemed waived). Clay himself has therefore waived any waiver argument that he might have made. *See, e.g., United States v. Anaya*, 32 F.3d 308, 312 (7th Cir. 1994). We note, in any event, that although it was the district court, rather than the government, that first raised the timeliness question below, the parties were given the opportunity to brief that question before the court dismissed Clay's motion. See R. 51 (ordering parties to show cause why Clay's section 2255 motion should not be dismissed as untimely); R. 52 (government's response); R. 53 (Clay's response). Clay was therefore not taken by surprise. *Cf. Venters v. City of Delphi*, 123 F.3d 956, 967-69 (7th Cir. 1997).

Section 2255 provides for a one-year period during which a federal prisoner may seek collateral review of his conviction. 28 U.S.C. § 2255. As relevant here, that one-year period began to run on the date on which the judgment of Clay's conviction became final. When an appellate court affirms a conviction and the defendant elects not to seek review by the United States Supreme Court, a question arises as to whether his conviction becomes final at the conclusion of the appellate proceedings, or at the expiration of the ninety-day period during which he may file a petition for certiorari. 28 U.S.C. § 2244, as amended by the Anti-Terrorism and Effective Death Penalty Act, answers this question for state prisoners by allowing them to initiate habeas review up to one year from "the date on which the judgment became final by the conclusion of direct review or the expiration of time for seeking such review." 28 U.S.C. § 2244(d)(1)(A) (emphasis added). In other words, this provision permits a state prisoner to file a habeas petition up to one year after the termination of the ninety-day period for filing a petition for a writ of certiorari, regardless of whether he actually filed such a petition. See SUP. CT. R. 13. The corresponding provision for federal prisoners, section 2255, lacks comparable language, however; and the omission has led this court to conclude that when a federal prisoner does not seek Supreme Court review of his conviction, he does not receive the benefit of the ninety-day period for filing a certiorari petition.

In *Gendron v. United States*, 154 F.3d 672 (7th Cir. 1998) (per curiam), *cert. denied sub nom. Ahitow v. Glass*, 526 U.S. 1113 (1999), we concluded that when a federal prisoner on direct appeal of his conviction does not file a certiorari petition, his conviction becomes final when the appellate court issues its mandate affirming his conviction. The movant in *Gendron* filed the motion to vacate his conviction one year and two weeks after this court had affirmed his conviction on direct appeal and issued the mandate. *Id.* 154 F.3d at 673. He had not filed a petition for

certiorari but argued that his conviction had not become final, for purposes of section 2255, until the time for filing that petition had expired. *Id.* In other words, "according to [appellant], the period of limitations should start to run, not from the date our mandate was issued, but [from] the date that review by the Supreme Court was precluded." *Id.* However, the absence of a provision akin to the one in section 2244 expressly providing for this particular time computation struck us as significant. "Because similar language is absent in § 2255, we conclude that Congress intended to treat the period of limitations differently under the two sections." *Id.* at 674. We held accordingly that "federal prisoners who decide not to seek certiorari with the Supreme Court will have the period of limitations begin to run on the date this court issues the mandate in their direct criminal appeal." *Id.*

We decline the invitation to reconsider our holding in *Gendron*, although the government correctly points out that our construction of section 2255 represents the minority view. *See United States v. Torres*, 211 F.3d 836 (4th Cir. 2000) (taking the same position as this court); *contra United States v. Garcia*, 210 F.3d 1058 (9th Cir. 2000); *United States v. Gamble*, 208 F.3d 536 (5th Cir. 2000) (per curiam); *United States v. Burch*, 202 F.3d 1274 (10th Cir. 2000); *Kapral v. United States*, 166 F.3d 565 (3rd Cir. 1999). Since *Gendron* was decided, we have declined to revisit its holding notwithstanding the circuit split. *See Garrott v. United States*, 238 F.3d 903 (7th Cir.), *cert. denied*, 121 S. Ct. 2230 (2001); *see also Gutierrez v. Schomig*, 233 F.3d 490 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 1421 (2001) (holding that time during which state prisoner could have, but did not, petition Supreme Court for review of state post-conviction judgment did not toll the one-year limitations period under section 2244(d)(2)). Bowing to stare decisis, we are reluctant to overrule a recently-reaffirmed precedent without guidance from the Supreme Court.

Clay's first appeal was decided by this Court on November 23, 1998, and the mandate was issued on

December 15, 1998. He did not seek review by the Supreme Court. Under the prevailing law of this circuit, he had until December 15, 1999 to seek collateral review. Clay did not file his motion until February 22, 2000, sixty-nine days too late. The law in this circuit is clear; Clay's motion to vacate his conviction under 28 U.S.C. § 2255 was not timely. For this reason, we find that the district court was correct when it denied the motion. We AFFIRM the judgment.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

ERICK C. CLAY, Petitioner
vs.
UNITED STATES OF AMERICA, Respondent.

Cause No. 3:00CV117RM / Arising from 3:97CR46RM

MEMORANDUM AND ORDER

On November 23, 1998, [the] United States Court of Appeals for the Seventh Circuit affirmed Eric[k] Clay's conviction and sentence for arson and distribution of a Schedule II substance. On February 22, 2000, Mr. Clay filed a motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his federal sentence and he requested leave to amend that motion on May 15. Mr. Clay's February 22 petition claims ineffective assistance of trial counsel and a defective indictment for arson. Mr. Clay's May 15 proposed amendment seeks to add an Ex Post Facto Clause argument and a claim of ineffective assistance of counsel during his plea bargaining stage. On June 21, the court afforded [the] parties to and including July 11 in which to show cause as to why Mr. Clay's § 2255 petition should not be dismissed as untimely. Both Mr. Clay and the government timely responded.

As more fully discussed in the court's order to show cause, The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") contains a one-year statute of limitations for petitions filed pursuant to 28 U.S.C. § 2255. Although other courts of appeal apply a different standard, *United States v. Garcia*, 210 F.3d 1058, 1058-1060 (9th Cir. 2000); *United States v. Gamble*, 208 F.3d 536, 536-537 (5th Cir. 2000); *United States v. Burch*, 202 F.3d 1274, 1279 (10th Cir.

2000); *Kapral v. United States*, 166 F.3d 565, 677 (3d Cir. 1999), when a federal prisoner in this circuit does not seek certiorari with the United States Supreme Court, the conviction becomes "final" on the date the appellate court issues the mandate in the direct appeal. *See Gendron v. United States*, 154 F.3d 672, 674 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 1758 (1999); *see also Horton v. United States*, No. 98-3481, 2000 WL 862844, at *3 (7th Cir. June 29, 2000); *United States v. Marcello*, Nos. 99-2294, 99-2451, 2000 WL 580669, at *2 (7th Cir. May 15, 2000) ("For defendants who try unsuccessfully to take their case to the Supreme Court, their judgments of conviction become final on the date their petitioners for certiorari are denied."). Mr. Clay didn't seek Supreme Court review, so he had until November 23, 1999[4] (one year from the date the Seventh Circuit issued the mandate in his direct criminal appeal) to file his § 2255 petition. Because Mr. Clay's § 2255 petition was not filed until February 22, 2000, almost three months past this filing date, his petition is time-barred.

When extraordinary circumstances far beyond the petitioner's control prevent timely filing, equitable tolling may be applicable. *See United States v. Marcello*, 2000 WL 580669, at *5. Mr. Clay does not argue that equitable tolling is applicable nor does he make reference to any extraordinary circumstances which might excuse his late filing. Without more than a missed deadline based on an assumption that Third Circuit precedent controlled courts in the Seventh Circuit, Mr. Clay cannot meet the high threshold necessary to trigger equitable tolling. *See id.* (citing *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 96 (1990); *Taliani v. Chrans*, 189 F.3d 597 (7th Cir. 1999)). Accordingly, the court denies Mr. Clay's § 2255 petition as untimely filed.

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[4] The clerk of the court of appeals sent the November 23, 1998 mandate to this court on December 15, 1998. As stated in the show cause order, Mr. Clay had until, at the latest, December 15, 1999 to file his § 2255 petition—a petition not filed until February 22, 2000.

Citing *Sanders v. United States*, 113 F.3d 184, 187 (11th Cir. 1997) and *Small v. Endicott*, 998 F.2d 411, 417 (7th Cir. 1993), Mr. Clay urges the court to liberally construe his § 2255 petition as a motion under Rule 60(b)(6) of the Federal Rules of Civil Procedure, which provides an extraordinary remedy invested in the trial court "to correct any error of law in the interest of justice." He further argues that because his sentence violates the Ex Post Facto clause of the Constitution, he has shown the extraordinary circumstances, a "substantial danger to [sic] the underlying sentence was unjust," that allow him relief under Rule 60(b).

Under § 2255, a federal prisoner in custody may move the trial court to vacate or correct a federal sentence if it was imposed in violation of the federal constitution. *See* 28 U.S.C. § 2255. While Rule 60(b) provides relief from judgment in "exceptional circumstances" necessitating an "extraordinary remedy," including mistake, excusable neglect, newly discovered evidence, fraud, or manifest injustice, *see* Fed. R. Civ. P. 60(b), "a prisoner who challenges his federal conviction or sentence . . . must proceed under 28 U.S.C. § 2255." *Waletzky v. Keohane*, 13 F.3d 1079, 1080 (7th Cir. 1994). Because Mr. Clay attacks his sentence, his motion must be classified as a § 2255 action, an action he simply filed too late in the Seventh Circuit.

Because the court has denied Mr. Clay's § 2255 petition as time-barred, any motion to amend that petition must also be denied.

For the foregoing reasons, the court

(1) DENIES Mr. Clay's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 [Docket No. 1/44] and

(2) DENIES Mr. Clay's motion to [sic] for leave to amend [Docket No. 50].

SO ORDERED. ENTERED: August 2, 2000

Robert L. Miller, Jr., Judge, United States District Court

Supreme Court, U.S.
FILED
JUN 7 2002
CLERK

(2)

No. 01-1500

In the Supreme Court of the United States

ERICK CORNELL CLAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's judgment of conviction became "final" within the meaning of 28 U.S.C. 2255 para. 6(1) one year after the court of appeals issued its mandate on direct appeal or one year after his time for filing a petition for a writ of certiorari expired.

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In the Supreme Court of the United States

No. 01-1500

ERICK CORNELL CLAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is unpublished but is available at 30 Fed. Appx. 607.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 2002. The petition for a writ of certiorari was filed on April 5, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted of arson, in violation of 18 U.S.C. 844(i), and distributing crack cocaine, in violation of 21 U.S.C. 841(a)(1). Pet. App. 2a. He was sentenced to 137

months of imprisonment, to be followed by three years of supervised release. *Ibid.*; *United States* v. *Clay*, No. 98-1783, 1998 WL 847098, at *2 (7th Cir. Nov. 23, 1998) (165 F.3d 33 (Table)). The court of appeals affirmed his convictions. Pet. App. 2a. The district court denied petitioner's motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence, but issued him a certificate of appealability. Pet. App. 2a-3a. The court of appeals affirmed the denial of the Section 2255 motion. *Id.* at 1a-6a.

1. During the summer of 1996, petitioner began selling crack cocaine to Tammy Sue Herring, who lived in a rented room in a house in South Bend, Indiana. Pet. App. 2a. In an apparent effort to settle Herring's drug debt to him, petitioner set the residence on fire. *Ibid.* The resulting blaze severely damaged the house and killed a dog and a kitten. *Ibid.*

A federal grand jury in the Northern District of Indiana returned a two-count indictment that charged petitioner with arson, in violation of 18 U.S.C. 844(i), and distributing crack cocaine, in violation of 21 U.S.C. 841(a)(1). Pet. App. 2a. On December 30, 1997, a petit jury found petitioner guilty of both charges, and the district court sentenced him to 137 months of imprisonment, to be followed by three years of supervised release. *Ibid.*; 1998 WL 847098, at *2.

2. On November 23, 1998, the United States Court of Appeals for the Seventh Circuit affirmed petitioner's convictions in an unpublished order. Pet. App. 2a. On December 15, 1998, the court of appeals issued its mandate. *Ibid.* Petitioner did not file a petition for a writ of certiorari. *Ibid.*

3. On February 22, 2000, petitioner, acting *pro se*, filed a motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence. Petitioner argued that the

indictment under which he was convicted failed to include the required mental state for arson and that his trial counsel rendered constitutionally ineffective assistance by (1) failing to move for judgment of acquittal on the arson charge based upon the purported lack of evidence that petitioner acted "maliciously"; (2) advising petitioner to "go to trial without any possible defense"; (3) failing to object to evidence of an out-of-court identification of petitioner; and (4) failing to raise several issues relating to sentencing. Motion under 28 U.S.C. 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody 5-6, 8. The government filed a response to the Section 2255 motion in which it argued that appellant's claims were "completely meritless." Gov't Response to 2255 Motion to Vacate, Set Aside, or Correct Sentence 1.

On May 4, 2000, petitioner filed a motion for leave to amend his Section 2255 motion. Motion for Leave to Amend 1. Petitioner tendered a proposed amendment adding claims that his sentence violated the Ex Post Facto Clause of the Fifth Amendment and that his lawyer rendered ineffective assistance by failing to advise him fully about a plea offer made by the government before trial. Amended Motion to Vacate Judgment or Sentence 1-2, 7-8.

On June 21, 2000, the district court filed a memorandum and order in which the court observed that 28 U.S.C. 2255 contains a limitations provision requiring, in pertinent part, that a federal prisoner file any motion for relief under Section 2255 within one year after the date on which his judgment of conviction becomes final. 6/21/00 Order 2. The court noted that "[petitioner's Section 2255] petition would seem to be time-barred" because he filed it more than one year after the court of appeals issued the mandate in his direct appeal, and

because he did not seek a writ of certiorari in this Court. *Id.* at 3. The court directed the parties "to show cause why [petitioner's Section 2255] petition should not be dismissed as untimely." *Id.* at 4.

The government filed a response to the court's memorandum and order in which the government acknowledged that petitioner's Section 2255 motion was untimely under Seventh Circuit law. Gov't Response to the Dist. Ct. Mem. and Order of June 21, 2000, at 1. The government explained, however, that the Department of Justice disagrees with the Seventh Circuit's interpretation of Section 2255's limitations provision and has instead adopted the position that "a conviction does not become 'final' under [Section] 2255 until expiration of the time allowed for certiorari review by the Supreme Court." *Id.* at 2 (quoting *Kapral* v. *United States*, 166 F.3d 565, 566 (3d Cir. 1999)). The government stated that "[petitioner's Section] 2255 Petition would be timely" under that construction of Section 2255. *Ibid.*

On August 2, 2000, the district court denied petitioner's Section 2255 motion and motion to amend. Pet. App. 7a-9a. Relying on *Gendron* v. *United States*, 154 F.3d 672, 674 (7th Cir. 1998) (per curiam), cert. denied, 526 U.S. 1113 (1999), the court stated that "when a federal prisoner in this circuit does not seek certiorari * * *, the conviction becomes 'final' on the date the appellate court issues the mandate in the direct appeal." Pet. App. 8a. Because petitioner did not file his Section 2255 motion until more than one year after that date, the court denied the motion as time-barred and rejected petitioner's subsequent motion to amend. *Id.* at 8a-9a. The court declined to excuse the late filing under the doctrine of equitable tolling (which petitioner had not raised) and declined petitioner's invitation to

grant relief under Rule 60(b) of the Federal Rules of Civil Procedure. Pet. App. 8a-9a.

Petitioner filed a notice of appeal, which the district court treated as an application for a certificate of appealability. 9/13/00 Order 1. After noting that, under 28 U.S.C. 2253(c)(2), "a certificate of appealability may issue . . . only if the applicant has made a substantial showing of the denial of a constitutional right" (*ibid.*), the court concluded that the "indictment issue" raised in petitioner's Section 2255 motion "does not amount to the denial of a constitutional right" (9/13/00 Order 2). The court next listed the four ineffective assistance claims raised in petitioner's original Section 2255 motion and stated that "only one issue exists for purposes of appeal: Whether [petitioner's] Sixth Amendment right to effective assistance of counsel was violated." *Ibid.*

4. On April 11, 2001, the court of appeals granted the government's motion to strike petitioner's initial court of appeals brief because, in that brief, petitioner failed to address any of the four Sixth Amendment claims for which the district court had issued the certificate of appealability. 4/11/01 Order 1. Petitioner argued only that he "received [in]effective assistance of counsel because his sentence violates the Ex Post Facto Clause of the United States Constitution" (2/10/00 Pet. C.A. Br. 5-9), a claim that petitioner had not raised in his Section 2255 motion and which the district court had denied him leave to include in the motion by amendment. 4/11/01 Order 1. The court of appeals stated that "[petitioner] may file another brief. In addition to addressing the four [ineffective assistance claims], both [petitioner] and the United States should address whether the district court correctly dismissed [his] habeas corpus petition as untimely given that the government

apparently waived reliance on the statute of limitations." *Ibid.*

On May 9, 2001, petitioner filed a second opening brief in the court of appeals. In that brief, petitioner argued only that the district court erred in dismissing his Section 2255 motion as untimely. 5/9/01 Pet. C.A. Br. 3-8. The brief did not address his ineffective assistance claims or the question whether the government had waived reliance on the statute of limitations. *Ibid.* The government submitted an answering brief in which it argued that petitioner had forfeited his ineffective assistance claims by failing to address them in his second opening brief and that those claims lacked merit in any event. 8/8/01 Gov't C.A. Br. 9-14. The government once again explained that, although the district court had correctly dismissed petitioner's Section 2255 motion as untimely under Seventh Circuit law, the United States disagrees with the court of appeals' precedent on that issue. *Id.* at 15-24. Petitioner's reply brief addressed the timing issue (including the question whether the government had waived any statute of limitations defense) but failed to address either his ineffective assistance claims or the government's argument that petitioner had forfeited them. 9/21/01 Pet. C.A. Reply Br. 1-5.

5. On January 25, 2002, the court of appeals issued an unpublished order in which it affirmed the judgment of the district court dismissing petitioner's Section 2255 motion. Pet. App. 1a-6a. The court of appeals agreed with the district court's conclusion that petitioner's Section 2255 motion was untimely. *Id.* at 5a-6a. The court declined petitioner's "invitation to reconsider [its] holding in *Gendron*, although the government correctly point[ed] out that [*Gendron*'s] construction of section 2255 represents the minority view." *Id.* at 5a. After

noting that petitioner had filed his Section 2255 motion "sixty-nine days too late," the court "f[ou]nd that the district court was correct when it denied the motion." *Id.* at 6a.

ARGUMENT

Petitioner seeks (Pet. 4-7) this Court's review of when a conviction becomes final under Section 2255 para. 6(1) for purposes of calculating the start of the one-year limitations period for filing timely motions. He argues, and we agree, that his judgment of conviction did not become final until the time for filing a petition for a writ of certiorari had elapsed and that the courts of appeals are in conflict on that issue. Nonetheless, that narrow procedural disagreement does not merit this Court's intervention. Furthermore, this case would not be an appropriate vehicle for resolving that disagreement among the courts of appeals: petitioner has abandoned his underlying claims, which lack merit in any event, and he therefore would not be entitled to relief however this Court resolved that disagreement.

1. Before the enactment in 1996 of the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, there was no significant time limit on the filing of motions for collateral relief under Section 2255. See Rule 9(a) of the Section 2255 Rules; *Vasquez* v. *Hillery*, 474 U.S. 254, 265 (1986) (interpreting corresponding state habeas corpus rule under 28 U.S.C. 2254); *United States* v. *Nahodil*, 36 F.3d 323, 327-328 (3d Cir. 1994) (applying *Vasquez* to a Section 2255 motion); *Lindh* v. *Murphy*, 96 F.3d 856, 866 (7th Cir. 1996) (en banc) (under pre-AEDPA regime, the prisoner could "wait a decade" to file his collateral attack), rev'd on other grounds, 521 U.S. 320 (1997). In Section 105 of the AEDPA (110 Stat. 1220), however, Congress

established a "1-year period of limitation" for Section 2255 motions. The one-year period runs from "the latest of" four specified events. 28 U.S.C. 2255 para. 6. Here, the relevant triggering event is "the date on which the judgment of conviction becomes final." *Id.* para. 6(1). Congress did not define when a judgment of conviction becomes "final" for purposes of Section 2255 para. 6(1).[1]

As petitioner observes, the courts of appeals are divided over when a judgment of conviction becomes "final" under 28 U.S.C. 2255 para. 6(1) in cases in which the defendant files an appeal but not a petition for a writ of certiorari. The Fourth and Seventh Circuits have held that the judgment in such cases becomes final on the date that the court of appeals issues its mandate on direct review. See *United States* v. *Torres*, 211 F.3d 836, 839-842 (4th Cir. 2000); *Gendron* v. *United States*, 154 F.3d 672, 673-675 (7th Cir. 1998) (per curiam), cert. denied, 526 U.S. 1113 (1999). Five other circuits have held, to the contrary, that a conviction does not become final until the time for filing a petition for a writ of certiorari expires. See *Kaufmann* v. *United States*, 282 F.3d 1336, 1337-1339 (11th Cir. 2002); *United States* v. *Gamble*, 208 F.3d 536, 537 (5th Cir. 2000); *United States* v. *Garcia*, 210 F.3d 1058, 1059, 1061 (9th Cir. 2000); *United States* v. *Burch*, 202 F.3d 1274, 1276-1279 (10th Cir. 2000); *Kapral* v. *United States*, 166 F.3d 565, 570-577 (3d Cir. 1999).

[1] Congress also did not define the term "judgment of conviction." In general, a federal prisoner's "judgment of conviction" includes both the adjudication of guilt and the sentence. See Fed. R. Crim. P. 32(d)(1); *Deal* v. *United States*, 508 U.S. 129, 132 (1993). In our view, that general definition is applicable in Section 2255 cases as well.

In our view, the conclusion of the majority of the circuits is correct, for the reasons set forth in the brief for the United States in opposition to the petition for a writ of certiorari in *Garrott* v. *United States*, 531 U.S. 941 (2000) (No. 99-9743), *available at* 2000 WL 33152364. Consistent with the text of the AEDPA and the background definition of finality long-approved by this Court in the context of post-conviction review, a federal judgment of conviction becomes "final" for purposes of Section 2255 para. 6(1) only when the possibility of further direct appellate review is exhausted. When a defendant files a petition for a writ of certiorari, the judgment of conviction becomes final when the petition is denied; when a defendant does not file such a petition, the judgment of conviction becomes final when the time for filing the petition expires. Here, petitioner's conviction did not become final under Section 2255 until February 22, 1999, 90 days after the court of appeals' decision affirming his conviction and sentence on direct review. See Sup. Ct. Rule 13.1. Because petitioner filed his Section 2255 motion within one year after that date—on February 22, 2000—it was timely.[2]

2. Notwithstanding that petitioner's Section 2255 motion was timely, the conflict of authority on the issue of when a conviction is "final" under Section 2255 para. 6(1) does not warrant review by this Court. The court of appeals' mandate generally issues 21 days after the entry of judgment. See Fed. R. App. P. 40, 41. A

[2] Petitioner's motion to amend and proposed amendment to the Section 2255 motion, on the other hand, were submitted on May 4, 2000, and, therefore, were untimely even under the correct construction of Section 2255 para. 6(1). Petitioner does not challenge that conclusion before this Court.

defendant has 90 days from the entry of the judgment to file a petition for a writ of certiorari. Sup. Ct. R. 13.1. Accordingly, because of the conflict among the courts, some defendants will have one year and 90 days from the entry of judgment by the court of appeals to file a Section 2255 motion, and others (such as petitioner) will have one year and 21 days—a difference of 69 days. Either time period will generally provide a sufficient opportunity for the filing of a Section 2255 motion. See Pet. App. 8a (rejecting equitable tolling because petitioner did not identify any "circumstances which might excuse his late filing").

Furthermore, because Section 2255 motions are filed in the district of sentencing, a federal prisoner can determine the specific timeliness rule governing his collateral attack long before the one-year limitations period begins to run. See *United States* v. *Marcello*, 212 F.3d 1005, 1009-1010 (7th Cir.) (in choosing between two reasonable interpretations of how to calculate a one-year limitations period, "what matters is establishing an unequivocal rule that lets litigants know where they stand"), cert. denied, 531 U.S. 878 (2000).[3]

Accordingly, the government believes that this Court's intervention to establish a uniform national rule is not necessary. This Court has denied at least two recent petitions raising this issue. See *Dunlap* v. *United States*, 122 S. Ct. 649 (2001) (No. 01-6014); *Wiley*

[3] With regard to petitioner's case, for instance, it has been firmly settled in the Seventh Circuit since before petitioner's direct appeal became final that, if certiorari is not sought, the one-year limitations period runs from the date on which the court of appeals issues its mandate. See *Gendron*, *supra* (decided Aug. 20, 1998). Thus, there is no unfairness in holding petitioner to the Seventh Circuit's rule.

v. *United States*, 528 U.S. 1006 (1999) (No. 99-5386). There is no reason for a different result here.[4]

3. This case would not, in any event, provide an appropriate vehicle for this Court's consideration of the question when a conviction becomes "final" for purposes of Section 2255 para. 6(1) because petitioner cannot obtain relief regardless of how the Court might resolve that question. Petitioner abandoned the ineffective assistance of counsel claims for which the district court issued a certificate of appealability by failing to raise those claims in any of his three briefs in the court of appeals. 2/10/01 Pet. C.A. Br. 1-8; 5/9/01 Pet. C.A. Br. 5-7; 9/21/01 Pet. C.A. Reply Br. 2-5. Under Rule 28(a)(9) of the Federal Rules of Appellate Procedure, the appellant's brief "must contain * * * appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." See also *Hojnacki* v. *Klein-Acosta*, 285 F.3d 544, 549 (7th Cir. 2002) ("A party waives any argument that it does not raise before the district court or, if raised in the district court, it fails to develop on appeal."). "Rule 28 applies equally to pro se litigants, and when a pro se litigant fails to comply with that rule,

[4] There also remains the possibility that the two circuits that have taken the minority view on the timeliness issue may reconsider that view as other courts of appeals adopt the majority position. Petitioner asserts that the conflict is "intractable" (Pet. 4) and supports that assertion by noting that the Seventh Circuit *panel* in this case declined to revisit the rule absent an opinion from this Court that calls into question Seventh Circuit precedent. The panel, of course, was not free to disregard Seventh Circuit precedent without such an opinion, but petitioner was free to seek rehearing en banc from the full Seventh Circuit. Petitioner declined to do so. In those circumstances, petitioner is ill-positioned to assert that the conflict among the courts of appeals cannot be resolved absent this Court's intervention.

[an appellate court] cannot fill the void by crafting arguments and performing the necessary legal research[.]" *Anderson* v. *Hardman*, 241 F.3d 544, 545 (7th Cir. 2001) (citation omitted). Petitioner's failure to pursue his ineffective assistance claims is particularly inexcusable under the circumstances of this case because the court of appeals issued an order instructing him to raise the claims, 4/11/01 Order 1, and the government filed a brief contending that the claims lack merit, see 8/8/01 Gov't C.A. Br. 10-15.

As that brief explains, see 8/8/01 Gov't C.A. Br. 10-14, petitioner's ineffective assistance claims lack merit, and he therefore would not be entitled to any relief even if he had not abandoned his underlying claims. Petitioner's Section 2255 motion provided only vague and in conclusory allegations and contained virtually no citations to the record to support his claims. See Motion under 28 U.S.C. 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody 1-8. Accordingly, there is no basis for concluding either that counsel's performance was deficient or that any of the purported attorney errors identified by petitioner prejudiced his defense. See *United States* v. *Hodges*, 259 F.3d 655, 660 (7th Cir. 2001) ("An ineffective assistance of counsel claim cannot stand on a blank record, peppered with the defendant's own unsupported allegations of misconduct.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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(3)

No. 01-1500

IN THE

Supreme Court of the United States

Erick Cornell Clay,

Petitioner,

v.

United States of America.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

It would be hard to imagine a more obvious cert. grant than this case. The Solicitor General frankly acknowledges (BIO 8) a five-to-two circuit split over whether the time to file a Section 2255 motion runs from the issuance of the court of appeals' mandate on direct appeal or instead from the expiration of the time to seek certiorari. He also admits (at 9) that the minority rule, which the Seventh Circuit applied in this case to dismiss petitioner's motion, is totally wrong on the merits, such that federal prisoners regularly have their Section 2255 motions wrongly dismissed as untimely. Finally, the petition demonstrated, and the Solicitor General notably does not contest, that the question presented is important and frequently recurring: seven circuits have been forced to confront it; the question is often outcome determinative in district court proceedings; and it can arise in many of the *thousands* of Section 2255 motions that are filed every year in even just those circuits that apply the minority rule. The Solicitor General's principal argument in opposing review – that the government believes it will win on remand – has literally nothing to do with the certiorari calculus. This case is a perfect vehicle to decide the question presented, and indeed not even the Solicitor General disputes that the Court would resolve the circuit conflict. The government's opposition to certiorari thus reflects no more than that the Solicitor General's office, although often pressing its own petitions, has determined to argue that not a *single* petition filed against the government this Term merits review in this Court, no matter how clearly certiorari is warranted. See *www.usdoj.gov/osg/briefs/2001/0responses/toc3index.html* (cataloging Solicitor General's oppositions in paid cases).[1]

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[1] For recent examples, see, *e.g.*, the BIOs in *Gisbrecht* v. *Massanari*, *cert. granted*, 122 S. Ct. 612 (2001) (No. 01-131); *Franconia Assocs.* v. *United States*, *cert. granted*, 122 S. Ct. 802 (2002) (No. 01-455); *BE&K Constr. Co.* v. *NLRB*, *cert. granted*, 122 S. Ct. 803 (2002) (No. 01-518); *Eldred* v. *Ashcroft*, *cert. granted*, 122 S. Ct. 1062 (2002) (No. 01-618);

1. There is no need to belabor the square circuit split that the Seventh Circuit recognized (Pet. App. 5a), the petition detailed (at 4), and the Solicitor General acknowledges (at 8). The fact that *seven* circuits have taken entrenched, conflicting positions on the question presented within the past few years establishes beyond peradventure that only this Court can establish the uniform interpretation of Section 2255 which Congress intended. The government's passing suggestion (at 11 n.4) that petitioner should have filed a *pro se* request for rehearing *en banc* is, of course, totally irreconcilable with the Solicitor General's regular practice of seeking review in this Court without taking that step.[2] Rehearing *en banc* is regularly denied when it offers no opportunity to resolve a circuit conflict, as is true in this case where two courts of appeals apply the minority rule. There manifestly is no realistic prospect that the circuits will resolve the entrenched conflict presented by this case because the Fourth Circuit has denied rehearing *en banc* despite the federal government's confession of error (see Pet. 4-5), *four* different panels of the Seventh Circuit composed of a majority of that court's judges have applied the minority rule without objection (*id.* 2, 4 (citing cases)), and the Seventh Circuit stated definitively in this case that it would not "overrule [its] recently-reaffirmed precedent without guidance from the Supreme Court" (Pet. App. 5a).

2. Nor is there any need to belabor that the question presented frequently recurs, for the Solicitor General does not deny that fact. The Petition (at 5-6) collected numerous

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Boeing Co. v. *United States*, *cert. granted*, 2002 U.S. LEXIS 3829 (May 28, 2002) (No. 01-1209); and *Borden Ranch* v. *United States Army Corps of Eng'rs*, *cert. granted*, 2002 U.S. LEXIS 4226 (June 10, 2002) (No. 01-1243).

[2] For just the examples in the past few *months*, see *FCC* v. *NextWave Personal Comms.*, *cert. granted*, 122 S. Ct. 1202 (2002) (No. 01-653); *United States* v. *Cotton*, *cert. granted*, 122 S. Ct. 803 (2002) (No. 01-687); and *Barnhart* v. *Peabody Coal Co.*, *cert. granted*, 122 S. Ct. 918 (2002) (No. 01-705).

appellate and district court cases in which the circuit conflict has been outcome determinative. Because the United States is the respondent in every Section 2255 motion, the Petition explained (at 6 n.2) that the government could not plausibly dispute the recurring nature of the question without identifying for this Court the cases in which it has arisen. The BIO's conspicuous silence on that point is pregnant. There were 1867 Section 2255 motions filed in the Fourth and Seventh Circuits *alone* last year. See 2001 ANNUAL REPORT OF THE DIRECTOR, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, tbl. C-3. Plainly, this case far exceeds the threshold of importance required to justify certiorari.

3. There also is no merit to the Solicitor General's argument (at 7-8, 10) that this case presents a "narrow procedural disagreement" unworthy of certiorari because either the majority or minority rule "will generally provide a sufficient opportunity for the filing of a Section 2255 motion." Almost every circuit split can be recharacterized as presenting two options, either of which is workable. The relevant point is that a square conflict on a recurring question of federal law is intolerable, particularly when, as in this case, it is outcome determinative and extinguishes an important right that Congress has seen fit to confer. The government's position is thus belied not only by innumerable cases in which this Court has granted certiorari to resolve a so-called "procedural disagreement,"[3] but also by the Solicitor General's own explanation (at 7-8) that Congress in the AEDPA enacted time-limits on Section 2255 *precisely* in

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[3] For recent examples, see, *e.g.*, *TRW* v. *Andrews*, 534 U.S. 19 (2001) (holding that the FCRA statute of limitations does not incorporate a "discovery" rule, resolving conflict between Ninth and Third, Seventh, Tenth, and Eleventh Circuits); *Duncan* v. *Walker*, 533 U.S. 167 (2001) (holding that AEDPA's statute of limitations is not tolled while a prior federal habeas petition is pending, resolving conflict between Second and Third, Fifth, and Ninth Circuits). See also *infra* at 9 (discussing *Edelman* v. *Lynchburg College*, *cert. granted*, 533 U.S. 928 (2001) (No. 00-1072)).

order to finally establish a single, uniform "time limit on the filing of motions for collateral relief."

The Solicitor General's related argument (at 10) that the conflict is supposedly tolerable because "a federal prisoner can determine the specific timeliness rule governing his collateral attack long before the one-year limitations period begins to run" was fully anticipated by the petition (at 5-6), which the government just ignores because it has no answer. Section 2255 motions are, as in this case, frequently uncounseled and filed by prisoners residing *outside* the jurisdiction in which they must file; it is utterly unrealistic to believe that uneducated prisoners lacking substantial legal resources will see their way clearly through the haze of the conflict. See Pet. 5. That is, no doubt, why the question continues to arise so frequently. The government's reliance (at 10) on the Seventh Circuit's observation that "what matters is establishing *an unequivocal rule* that lets litigants know where they stand" (*United States* v. *Marcello*, 212 F.3d 1005, 1009-10, *cert. denied*, 531 U.S. 878 (2000) (emphasis added)) has it backwards: that is precisely what is missing now under Section 2255, and few areas of the law could benefit more from "a uniform national rule" (contra BIO 10).

In any event, given the overriding interest in the uniform application of federal law, this Court regularly grants certiorari, including in petitions filed by the Solicitor General, notwithstanding the objection that the petitioner's conduct conceivably could be adapted to each circuit's rule. But even if the Solicitor General's position were correct on its own terms, certiorari would nonetheless be warranted to avoid burdensome litigation over the question presented in the four circuits – the First, Second, Sixth, and Eighth – that have not yet taken a position in the conflict, in which more than *2000* Section 2255 motions were filed last year. See 2001 ANNUAL REPORT OF THE DIRECTOR, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, tbl. C-3.

4. The Solicitor General's contention (at 10-11) that this Court has previously declined to review the question presented, and that "[t]here is no reason for a different result here," is just wrong. As the government explains (at 8), only "[t]he Fourth and Seventh Circuits have held that the judgment in such cases becomes final on the date that the court of appeals issues its mandate on direct review." Thus, the decisions of the Fifth and Sixth Circuits cited by the Solicitor General – *Dunlap* v. *United States*, 250 F.3d 1001 (CA6), *cert. denied*, 122 S. Ct. 649 (2001), and *Wiley* v. *United States*, Order (CA5 Mar. 2, 1999), *cert. denied*, 528 U.S. 1006 (1999) – did not raise the question presented here. The only relevant petition is instead No. 99-9743, *Garrott* v. *United States*, in which the Court did *not* deny certiorari but instead vacated and remanded. See Pet. 7 n.3.

The habeas petitioner in *Dunlap* claimed in the lower courts only that his 2255 petition was timely under the equitable tolling doctrine. The Sixth Circuit addressed only that argument (holding "that equitable tolling does apply to the one-year limitation period applicable to habeas petitions" (250 F.3d at 1003)) and thus did not purport to decide the meaning of "final" under Section 2255. As the Solicitor General explained in *Dunlap*, but blithely ignores now: "In the district court, petitioner did not argue that his Section 2255 motion was timely filed within the one-year limitation period. Nor did petitioner raise that argument in the court of appeals." No. 01-6014 BIO 10-11. See also *id.* 11 ("This Court ordinarily does not review claims not properly raised or passed on below."); *id.* 11 n.3 (explaining that Sixth Circuit had not taken a position on the question presented).

In *Wiley*, the Fifth Circuit did not "hold" anything at all, but rather denied a certificate of appealability, and the petitioner (like the petitioner in *Dunlap*) furthermore did not allege on appeal that his conviction became "final" when the time to seek certiorari expired. *Wiley* thus could not, and did not, present this Court with the opportunity to decide the proper construction of "final" under Section 2255. As the

Solicitor General advised the Court in *Wiley*, but once again too conveniently ignores in this case, "[p]etitioner did not argue [below] that his judgment of conviction became final on the date that his petition for certiorari would have been due; indeed, he specifically repudiated any such argument." No. 99-5386 BIO 10. See also *id.* 11 ("In short, petitioner did not squarely raise in the court of appeals the argument that he advances in this petition, and it is questionable whether that court considered the argument when it summarily denied petitioner's application."). In any event, at the time the *Wiley* petition arose, the circuits were split only one-to-one (see *id.* 7); the fact that the conflict is now *five-to-two* (see BIO 8) demonstrates that this Court's intervention is warranted.

5. Nor is there merit to the Solicitor General's final contention (at 7) that "this case would not be an appropriate vehicle for resolving [the] disagreement among the courts of appeals" because the Solicitor General believes that petitioner will lose once the case is remanded by this Court to the Seventh Circuit and thus he supposedly "cannot obtain relief regardless of how the Court might resolve" the question presented. BIO 11. In reality, there is no disagreement *at all* that this case is an "appropriate vehicle" to resolve the circuit conflict over the question presented. The Seventh Circuit addressed *only* that question, which is, in turn, the only issue that this Court would decide on certiorari. What the court of appeals might, or might not, hold on remand with respect to the merits is utterly irrelevant.[4]

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[4] Indeed, the suitability of granting certiorari in a case in this procedural posture was explicitly raised in *United States* v. *Bean*, *cert. granted*, 122 S. Ct. 917 (Jan. 22, 2002) (No. 01-704), in which the government successfully took precisely the opposite position from the one it advances here. In that case, there was a strong argument that the respondent would prevail in the Fifth Circuit even if this Court reversed the court of appeals' judgment and remanded. But, after detailing recent cases in which this Court had granted certiorari notwithstanding that possibility, the Solicitor General explained that "when an issue resolved by a court of appeals warrants review, the existence of a potential

The undisputed fact that this Court would, in fact, resolve the important circuit conflict over the question presented takes on special significance in the context of this case. For two distinct reasons, appropriate vehicles to decide the issue will be few and far between, such that it would be particularly inappropriate to defer review. First, no petition for certiorari will *ever* be filed from the majority of jurisdictions because the federal government concedes the minority view. Second, Section 2255 petitioners generally proceed *pro se* and rarely manage to preserve jurisdictional issues properly through the district court, the court of appeals, and then this Court. The petitioners in *Dunlap* and *Wiley*, *supra*, are perfect examples. So too is the petitioner in *United States* v. *Torres*, 211 F.3d 836 (CA4 2000), who attempted to file his *pro se* petition for certiorari in the Fourth Circuit and thereby missed the statutory deadline for filing in this Court. See Pet. 7-8 & n.3. This Court accordingly should take the opportunity presented by this case to resolve the conflict over the meaning of "final" in Section 2255.

6. Furthermore, the Solicitor General's claim that petitioner has "abandoned" his substantive claims on appeal by briefing the timeliness issue that the court of appeals actually resolved is simply wrong. Put bluntly, that is not for the government to decide and it is most doubtful that the Seventh Circuit agrees. Indeed, the principal argument pressed by the government below was that petitioner "failed to address the Sixth Amendment claim for which the district court had issued the certificate of appealability," but the Seventh Circuit *expressly did not accept* that argument, electing to "not reach the merits of the Sixth Amendment claim." Pet. App. 3a. If the court of appeals actually believed that petitioner had, in fact, abandoned his claim, it would not

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alternative ground relied upon by the district court, but not addressed by the court of appeals, is not a barrier to such review." No. 01-704 Cert. Reply 3.

have hesitated to dismiss his appeal on that ground.[5] And doubts that the Seventh Circuit would find a waiver here are particularly strong given that court's lenient standard for evaluating *pro se* briefs, under which it need only be "able to understand [the party's] argument" from all the papers in the case in order for it to be "saved * * * from being considered waived." *United States* v. *Morris*, 259 F.3d 894, 898-99 (2001) (citing *Smith* v. *Town of Eaton*, 910 F.2d 1469, 1471 (CA7 1990) (holding that *pro se* appellant's brief was adequate because court could "glean, albeit faintly–the basic facts and general lines of argument from the briefs and record"), *cert. denied*, 499 U.S. 962 (1991)); *McCottrell* v. *EEOC*, 726 F.2d 350, 351 (CA7 1984) (declining to dismiss appeal when *pro se* brief, "though woefully inadequate, sets forth a discernible, albeit unsupported, argument")).[6]

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[5] For recent examples, see, *e.g.*, *Smith* v. *Madison County Firemen's Ass'n*, No. 01-2323, 2002 U.S. App. LEXIS 7633 (CA7 Apr. 22, 2002); *Barr-Carr* v. *Kalinowski*, No. 01-1125, 2001 U.S. App. LEXIS 25059 (CA7 Nov. 20, 2001); *Baker* v. *Department of Human Servs. Shapiro Dev. Ctr.*, No. 00-3203, 2001 U.S. App. LEXIS 22470 (CA7 Oct. 12, 2001); *King* v. *A&R Katz Mgmt.*, No. 01-1911, 2001 U.S. App. LEXIS 22492 (CA7 Oct. 12, 2001); *Vann Nelson* v. *City of Chicago*, No. 00-3433, 2001 U.S. App. LEXIS 19076 (CA7 Aug. 17, 2001).

[6] In this case, for example, petitioner *did* expressly assert in his opening appellate brief that he had been deprived of the effective assistance of counsel in violation of the Sixth Amendment. The government's objection was that he had not sufficiently addressed the specific ineffectiveness claim on which he had received a COA, but rather addressed only a claim that was the subject of a proposed amendment to his Section 2255 application, which the district court refused to accept, of course, because it had ruled that even the initial application was untimely. In these circumstances, it is quite likely that the Seventh Circuit would deem petitioner's brief sufficient to preserve his constitutional claim, as evidenced by the fact that it did not accept the argument that petitioner's appeal should be dismissed. And the fact that the district court issued petitioner a COA on his constitutional claim belies the government's remaining argument (at 12) that petitioner's Section 2255 motion raises no serious issue for the district court to consider, an argument that in any event has nothing at all to do with this Court's certiorari determination.

Of particular note, this is not a case in which the court of appeals ever anticipated deciding the question on which the district court granted a certificate of appealability. The district court never addressed the substance of the ineffective assistance of counsel claim on which it issued the certificate but rather dismissed petitioner's Section 2255 motion as untimely. Realistically, the Seventh Circuit would have only addressed the latter issue because it was in no position to resolve the fact-bound questions relating to petitioner's underlying constitutional claim, which petitioner has not yet had any opportunity to develop. Petitioner thus manifestly did comply with Fed. R. App. P. 28, because his brief contained a detailed analysis of his "contentions and reasons for them, with citations to the authorities and parts of the record on which [he] relies" on the timeliness question the Seventh Circuit could, and ultimately did, decide.

7. That the reasons proffered by the Solicitor General for denying certiorari in this case lack substance is ultimately apparent by comparing them with his position in *Edelman* v. *Lynchburg College*, *cert. granted*, 533 U.S. 928 (2001) (No. 00-1072). *Edelman* involved a six-to-two circuit conflict over the validity of a regulation providing that a Title VII charge need not be verified before the statute of limitations expires. Manifestly, that conflict was "tolerable" in the sense that the Solicitor General urges here: Title VII claimants *already* submitted their charges before the statutory deadline; the only question was whether they also had to verify them in advance. Moreover, Title VII charges, unlike Section 2255 motions, almost uniformly are filed in the jurisdiction in which the claimant resides (making it easier for the claimant to determine the correct rule) and frequently are filed by counsel. The respondent in *Edelman* also argued that certiorari should be denied because the claimant's filing in that case did not actually constitute a "charge" for purposes of Title VII. Judge Luttig had concurred on that ground in the court of appeals, but the majority did not reach these issues. The Solicitor General (responding to this Court's invitation to

express the views of the United States) correctly explained that these objections were immaterial: the circuit conflict brought the case squarely within "the traditional considerations governing certiorari," and the conflict was intolerable because "the great majority of discrimination complaints are submitted by individuals who are unlikely to know at the time of submission that the charge must be verified." No. 00-1072 U.S. Cert. Br. 8, 18. Furthermore, "respondent will be able to present on remand its alternate argument" that the petitioner's submission did not qualify as a "charge." *Id.* 20. Indeed, the grounds for granting certiorari were heightened, the Solicitor General explained, because "[t]he court of appeals' decision, moreover, is erroneous." *Id.* 8. For each of the reasons that the Solicitor General articulated in support of certiorari in *Edelman*, so too certiorari should be granted in this case.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, certiorari should be granted.

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No. 01-1500

IN THE

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Erick Cornell Clay,

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On Writ of Certiorari
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QUESTION PRESENTED

A federal prisoner must generally file a post-conviction motion under 28 U.S.C. 2255 within one year of "the date on which [his] judgment of conviction becomes final." However, the statute does not define the term "final."

The question presented is whether petitioner's judgment of conviction became "final" within the meaning of 28 U.S.C. 2255 para. 6(1) when the court of appeals issued its mandate on direct appeal or when his time for filing a petition for a writ of certiorari expired.

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BRIEF FOR THE PETITIONER

OPINION BELOW

The opinions of the court of appeals (Pet. App. 1a-6a) and district court (*id.* 7a-9a) are unpublished.

JURISDICTION

The judgment of the court of appeals was issued on January 25, 2002. The petition for a writ of certiorari was filed on April 5, 2002, and was granted on June 28, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

28 U.S.C. 2255 provides, in relevant part: "A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—(1) the date on which the judgment of conviction becomes final; * * *."

28 U.S.C. 2244(d)(1) provides, in relevant part:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; * * *.

28 U.S.C. 2263 provides, in relevant part:

> (a) Any application under this chapter [28 U.S.C. 2261-66] for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.
>
> (b) The time requirements established by subsection (a) shall be tolled—(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final

> disposition of the petition if a State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review; * * *.

Federal Rule of Appellate Procedure 40(a)(1) provides, in relevant part: "Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment."

Federal Rule of Appellate Procedure 41(b) provides, in relevant part: "The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after the entry of an order denying a timely petition for panel rehearing, rehearing en banc, or motion for stay of mandate, whichever is later."

Supreme Court Rule 13.1 provides, in relevant part:

> Unless otherwise provided by law, a petition for a writ of certiorari to review a judgment in any case, civil or criminal, entered by a state court of last resort or a United States court of appeals * * * is timely when it is filed with the Clerk of this Court within 90 days after entry of judgment. A petition for a writ of certiorari seeking review of a judgment of a lower state court that is subject to discretionary review by the state court of last resort is timely when it is filed with the Clerk within 90 days after entry of the order denying discretionary review.

STATEMENT

1. Federal courts have had the power to issue writs of habeas corpus, "'the most celebrated writ in the English law,'" since Congress enacted the Judiciary Act of 1789, 1 Stat. 73, 81-82. See *United States* v. *Hayman*, 342 U.S. 205, 210 (1952) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *129). In 1867, Congress extended the writ – which had previously been unavailable at common law to those convicted in courts of general criminal jurisdiction – to "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." *Id.* at 211. In 1948, Congress enacted 28 U.S.C. 2255, which allows federal prisoners to seek collateral review of their sentences and was "intended simply to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined." *Hill* v. *United States*, 368 U.S. 424, 427 (1962). The statute provides:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. 2255 para. 1.

As originally enacted, Section 2255 included no statute of limitations; "a federal prisoner had unlimited time in which to file a motion" for collateral relief. See *United States* v. *Garcia*, 210 F.3d 1058, 1059 (CA9 2000). In 1996, Congress added Paragraph 6 of Section 2255 to establish a one-year limitation period in which a federal prisoner must file any motion to vacate, set aside, or correct his sentence. This one-year limitation period begins to run on the latest of four dates, which may include "the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed" (para. 6(2)), "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review" (para. 6(3)), or "the

date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence" (para. 6(4)). In the mine-run of cases, however, Section 2255's limitation period begins to run on "the date on which the judgment of conviction becomes final" (para. 6(1)).

2. This case arises from charges that, in 1996, petitioner Erick Cornell Clay sold crack cocaine to Tammy Sue Herring, who rented a room in a South Bend, Indiana house. Pet. App. 2a. The government charged that, on October 18, 1996, as part of an apparent effort to settle Herring's outstanding debts to him, petitioner set the house on fire. *Id.* The fire severely damaged the house. *Id.*

Petitioner was indicted by a federal grand jury on charges of arson and distribution of crack cocaine in violation of 18 U.S.C. 844(i) and 21 U.S.C. 841(a)(1), respectively. Pet. App. 2a. A jury subsequently convicted petitioner of both counts, and the district court sentenced him to 137 months in prison. *Id.*

Petitioner timely appealed. In an unpublished order issued on November 23, 1998, the United States Court of Appeals for the Seventh Circuit affirmed petitioner's conviction. 165 F.3d 33 (table), No. 98-1783, 1998 U.S. App. LEXIS 30134; see Pet. App. 2a. Petitioner did not file a petition for rehearing, and, pursuant to the requirements of the Federal Rules of Appellate Procedure, the Seventh Circuit issued its mandate twenty-one days later, on December 15, 1998. See Fed. R. App. P. 40(a)(1) ("Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment."); Fed. R. App. P. 41(b) ("The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, rehearing en banc, or motion for stay of mandate, whichever is later.").

Pursuant to Supreme Court Rule 13.1, petitioner had ninety days from the Seventh Circuit's entry of judgment – *i.e.*, until February 22, 1999 – to file a petition for a writ of certiorari in this Court. He did not do so.

3. On February 22, 2000 – one year and sixty-nine days after the Seventh Circuit issued its mandate on petitioner's direct appeal, but exactly one year after the time for petitioner to file a petition for certiorari expired – petitioner filed a *pro se* motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence. Petitioner alleged, *inter alia*, that his indictment was defective and his trial counsel was constitutionally ineffective.

The United States opposed petitioner's Section 2255 motion based solely on its view that the claims raised in the motion were "meritless." Gov't Response to 2255 Motion to Vacate, Set Aside, or Correct Sentence 1. The government's response did not question the timeliness of petitioner's motion. See Pet. App. 3a n.1.

On June 21, 2000, the district court filed a memorandum and order in which it indicated that petitioner's Section 2255 motion "would seem to be time-barred" under extant Seventh Circuit precedent because it was filed more than one year after the court of appeals issued its mandate in petitioner's direct appeal, and because petitioner had not filed a petition for a writ of certiorari. See App., *infra*, at 4a-5a. The district court directed the government and petitioner "to show cause why [petitioner's Section 2255] petition should not be dismissed as untimely." See *id.* 5a. It gave the government this opportunity based on its view that, on appeal, "the government would have to defend a dismissal" based on untimeliness. *Id.*

In its response to the district court's June 21, 2000 order, the government acknowledged that petitioner's Section 2255 motion was untimely under the Seventh Circuit's interpretation of the statute's limitation provision, but explained that it disagreed with that interpretation. According to the govern-

ment, petitioner's Section 2255 motion was timely because, as other courts of appeals had held, "a conviction does not become 'final' under [Section] 2255 until expiration of the time allowed for certiorari review by the Supreme Court." Gov't Resp. to June 21, 2000 Order 2 (quoting *Kapral* v. *United States*, 166 F.3d 565, 567 (CA3 1999)).

On August 2, 2000, the district court issued a memorandum and order in which it denied petitioner's Section 2255 motion as time-barred. See Pet. App. 7a-9a. Citing Seventh Circuit precedent such as *Gendron* v. *United States*, 154 F.3d 672, 674 (1998) (per curiam), *cert. denied*, 526 U.S. 1113 (1999), the district court explained that "[a]lthough other courts of appeal apply a different standard, * * * when a federal prisoner in this circuit does not seek certiorari with the United States Supreme Court, the conviction becomes 'final' on the date the appellate court issues the mandate in the direct appeal." Pet. App. 7a-8a. The district court continued:

> [Petitioner] didn't seek Supreme Court review, so he had until November 23, 1999 (one year from the date the Seventh Circuit issued the mandate in his direct criminal appeal) to file his § 2255 petition. Because [petitioner's] § 2255 petition was not filed until February 22, 2000, almost three months past this filing date, his petition is time-barred.

Id. 8a.[1]

---

[1] Although both the district court's June 21, 2000 order to show cause (App., *infra*, at 4a-5a) and its August 2, 2000 memorandum and order denying petitioner's Section 2255 motion (Pet. App. 8a & n.4) suggest that the court of appeals issued its mandate on November 23, 1998, that is not correct: the docket sheet for petitioner's direct appeal makes clear that the mandate was properly issued, as required by the Federal Rules of Appellate Procedure, on December 15, 1998. See App., *infra*, at 1a-2a (reproducing the relevant docket entries).

The district court furthermore declined to apply principles of equitable tolling to save petitioner's Section 2255 motion from dismissal. The district court explained that "[w]ithout more than a missed deadline based on an assumption that Third Circuit precedent controlled courts in the Seventh Circuit, [petitioner] cannot meet the high threshold necessary to trigger equitable tolling." Pet. App. 8a. Nor, the district court held, could petitioner challenge his conviction pursuant to Fed. R. Civ. P. 60(b) rather than Section 2255. Pet. App. 9a.

The district court accordingly dismissed petitioner's Section 2255 application as untimely (Pet. App. 9a), but granted petitioner a certificate of appealability (see *id.* 3a).

4. Petitioner timely appealed. In response to petitioner's appeal, the United States argued that the Seventh Circuit's interpretation of Section 2255's limitation provision was erroneous:

> The courts of appeals are divided over when a judgment of conviction becomes "final" under 28 U.S.C. 2255 ¶ 6(1) in cases in which the defendant files an appeal but not a petition for a writ of certiorari. The Fourth Circuit along with this circuit have held that the judgment in such cases becomes final on the date that the court of appeals issues its mandate on direct review. * * *
>
> Four other circuits have held to the contrary, that a conviction does not become final under Section 2255 until the time for filing a petition for a writ of certiorari expires. In the Department's view, the reasoning and conclusions of those latter circuits is correct.

Gov't C.A. Br. 18-19. See also *id.* 17 ("Clay argues, and the Solicitor General agrees, that his judgment of conviction did not become final until the time for filing a petition for a writ of certiorari had elapsed.").

Deeming the timeliness issue "to be dispositive of the case," the Seventh Circuit affirmed the district court's denial of petitioner's Section 2255 motion. Pet. App. 3a. The court

of appeals acknowledged that its "construction of section 2255 represents the minority view," but nonetheless "decline[d] the invitation to reconsider [its] holding in *Gendron*." *Id.* 5a. The court further noted that "[s]ince *Gendron* was decided, we have declined to revisit its holding notwithstanding the circuit split." *Id.* (citing *Garrott* v. *United States*, 238 F.3d 903 (CA7) (per curiam), *cert. denied*, 532 U.S. 1072 (2001); *Gutierrez* v. *Schomig*, 233 F.3d 490 (CA7 2000), *cert. denied*, 532 U.S. 950 (2001)). "Bowing to *stare decisis*," the court explained, it would not "overrule a recently-reaffirmed precedent without guidance from the Supreme Court." *Id.*

This Court subsequently granted petitioner's timely Petition for a Writ of Certiorari. 122 S. Ct. 2658 (2002). Advised that respondent United States declined to defend the Seventh Circuit's ruling, this Court appointed counsel to brief and argue this case as *amicus curiae* in support of the judgment below. 71 U.S.L.W. 3115 (2002).

SUMMARY OF ARGUMENT

The construction of Section 2255 advanced by petitioner and the majority of the courts of appeals to have considered the issue is the only one consistent with both the plain meaning of "final" and Congress's intent. Contrary to the view of the Fourth and Seventh Circuits, a judgment of conviction is not "final" when the appellate mandate issues, for the judgment remains subject to further review in this Court. Petitioner's construction also comports with this Court's precedents, which have repeatedly defined "final" in the context of post-conviction review as the date on which "the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed" (*Linkletter* v. *Walker*, 381 U.S. 618, 622 n.5 (1965)). There is no indication that Congress intended to deviate from this settled definition; indeed, Congress expressly relied on it in Section 2244(d)(1), which established a one-year limitation period for state prisoners to file their federal habeas corpus petitions.

Even if Congress had intended to depart from this Court's definition of "final," it is unlikely that it would have chosen the definition advanced by the Fourth and Seventh Circuits, given that the issuance of the appellate mandate – unlike the expiration of the time to seek certiorari – has little legal significance and occurs at a time at which the prisoner may still seek review in this Court.

Petitioner's interpretation of Section 2255 best accounts for Congress's use of the term "final" in Section 2244(d)(1)(A), which provides that a one-year limitation period for state prisoners to file federal habeas petitions may begin to run from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." Because basic principles of statutory interpretation "assume that identical words used in different parts of the same act are intended to have the same meaning" (*Sorenson* v. *Secretary of the Treasury*, 475 U.S. 851, 860 (1986)), Congress's use of the term "final" in Section 2255 strongly suggests that a judgment of conviction becomes "final" only when review in the Supreme Court has concluded or the time to seek such review has expired. Moreover, although there is no indication that Congress intended different limitation periods to apply to federal and state prisoners, any such assumption would – in light of the states' interests in comity and finality – actually weigh in favor of a shorter limitation period for state, rather than federal, prisoners.

The Fourth and Seventh Circuits' reliance on the alleged "omission" from Section 2255 of the language included in Section 2244(d)(1)(A)'s limitation period is misplaced, as there is no relevant omission from Section 2255. If anything, it is more likely that Congress in Section 2244 identified two circumstances in which a judgment becomes final to eliminate any potential confusion created by the variable meaning of "final" under state law. In any event, the interpretation advanced by the minority circuits lacks support in either the

very principle of statutory construction on which those courts rely or the history and purpose of the AEDPA.

Finally, the Fourth and Seventh Circuits' interpretation of Section 2255 is belied by Congress's decision, in 28 U.S.C. 2263, to establish precisely the scheme that those courts contend Congress implicitly established for federal prisoners in Section 2255. Simply put, if Congress had intended that Section 2255's one-year limitation period would begin to run with the issuance of the appellate mandate but would then be tolled in the case of a prisoner filing a petition for a writ of certiorari, it would have – as it did in Section 2263 – explicitly so provided.

The judgment of the court of appeals accordingly should be reversed.

ARGUMENT

In 1789, Congress enacted the Judiciary Act, 1 Stat. 73, 81-82, which empowered federal courts to issue writs of habeas corpus, "'the most celebrated writ in the English law.'" *United States* v. *Hayman*, 342 U.S. 205, 210 (1952) (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES *129). For nearly eighty years, the writ was generally unavailable at common law to those convicted in courts of general criminal jurisdiction; however, in 1867, Congress extended it to apply to all cases in which "any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States." *Id.* at 211. In 1948, Congress enacted 28 U.S.C. 2255, which was "intended * * * to provide in the sentencing court a remedy exactly commensurate with that which had previously been available by habeas corpus in the court of the district where the prisoner was confined" (*Hill* v. *United States*, 368 U.S. 424, 427 (1962)) and thus allows federal prisoners to move to vacate, set aside, or correct their sentences (28 U.S.C. 2255 para. 1).

Prior to 1996, Congress did not impose an explicit time limitation on Section 2255 motions. Rather, the pre-AEDPA

version of Section 2255 expressly provided that "[a] motion for such [collateral] relief may be made at any time." See, *e.g.*, Rule 9(a) of the Rules Governing Section 2255 Proceedings advisory committee's note; *Vasquez* v. *Hillery*, 474 U.S. 254, 265 (1986) (interpreting Section 2254, the corresponding rule for state prisoners seeking collateral relief); *United States* v. *Nahodil*, 36 F.3d 323, 327-28 (CA3 1994) (applying *Vasquez* to Section 2255 motion). In 1996, however, Congress enacted the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which was expressly intended to limit the time for prisoners to seek collateral relief. See *United States* v. *Burch*, 202 F.3d 1274, 1275 (CA10 2000). Thus, Section 105 of the AEDPA (110 Stat. 1220) amended Section 2255 to impose a "1-year period of limitation" for motions for collateral relief.

Section 2255's one-year limitation period begins to run from the latest of four dates, which include

> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action; (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. 2255 para. 6(2)-(4). In most cases, however, the limitation period begins to run when a "judgment of conviction" becomes "final" (para. 6(1)) – terms that are not expressly defined in the statute.

In federal criminal practice, a "judgment of conviction" is a document, "signed by the judge and entered by the clerk" of the district court, that "set[s] forth the plea, the verdict or

findings, the adjudication, and the sentence." Fed. R. Crim. P. 32(d)(1). This Court has accordingly held that a "judgment of conviction includes both the adjudication of guilt and the sentence." *Deal* v. *United States*, 508 U.S. 129, 131 (1993). See also *Ball* v. *United States*, 470 U.S. 856, 862 (1985) ("The sentence is a necessary component of a 'judgment of conviction.'"). Consistent with the well-settled meaning of "judgment of conviction," Section 2255's limitation period thus begins to run when the prisoner's conviction and sentence become final. See *Kapral* v. *United States*, 166 F.3d 565, 569 (CA3 1999). "Final" is defined as "allowing no further doubt or dispute." THE NEW OXFORD AMERICAN DICTIONARY 633 (2001).

In cases in which a prisoner does file a timely petition for certiorari on direct appeal, the courts of appeals have consistently held that the judgment of conviction becomes final for purposes of Section 2255's limitation provision when this Court either denies the petition or affirms the conviction and sentence on the merits. See, *e.g.*, *Kaufmann* v. *United States*, 282 F.3d 1336, 1338 (CA11 2002); *United States* v. *Segers*, 271 F.3d 181, 186 (CA4 2001), *cert. denied*, 122 S. Ct. 1331 (2002); *United States* v. *Marcello*, 212 F.3d 1005, 1008 (CA7), *cert. denied*, 531 U.S. 878 (2000); *United States* v. *Thomas*, 203 F.3d 350, 354-55 (CA5 2000); *United States* v. *Willis*, 202 F.3d 1279, 1280-81 (CA10 2000); *Kapral* v. *United States*, 166 F.3d 565, 577 (CA3 1999). Cf. *United States* v. *Colvin*, 204 F.3d 1221, 1223 n.2 (CA9 2000) ("Presumably, * * * the judgment does not become final until the Supreme Court either denies the petition or until the Court's resolution of the case is acted upon by the lower courts. It would defy logic to hold that a judgment is final while an appeal is still pending before the Supreme Court."). Thus, for a federal prisoner who files a timely petition for certiorari on direct appeal, Section 2255's limitation period will begin to run on the same day regardless of the circuit in which the prisoner was convicted.

The courts of appeals have reached divergent results, however, in cases in which a prisoner does *not* file a petition for certiorari on direct review. The First, Third, Fifth, Ninth, Tenth, and Eleventh Circuits have held that Section 2255's limitation period begins to run when the time to seek certiorari expires. See, *e.g.*, *Derman* v. *United States*, 298 F.3d 34, No. 01-2545, 2002 U.S. App. LEXIS 14909, at *16 (CA1 July 25, 2002) (for purposes of AEDPA, "a conviction for a federal defendant who fails to file a petition for a writ of certiorari becomes final when the period in which he seasonably might have done so expires"); *Kaufmann*, 282 F.3d at 1338; *United States* v. *Garcia*, 210 F.3d 1058, 1060 (CA9 2000); *United States* v. *Gamble*, 208 F.3d 536, 536 (CA5 2000) (per curiam); *United States* v. *Burch*, 202 F.3d 1274, 1279 (CA10 2000); *Kapral*, 166 F.3d at 566. Under this approach, Section 2255's limitation period will thus begin to run ninety days after the entry of the court of appeals' judgment – at which time, pursuant to this Court's Rule 13.1, the time to file a petition for certiorari expires.

In contrast, however, the Fourth and Seventh Circuits have held that when a federal prisoner does *not* file a petition for certiorari on direct review, Section 2255's limitation period begins to run when the court of appeals issues its mandate. See, *e.g.*, *United States* v. *Torres*, 211 F.3d 836, 837 (CA4 2000); *Gendron* v. *United States*, 154 F.3d 672, 674 (CA7 1998) (per curiam), *cert. denied*, 526 U.S. 1113 (1999). Because the mandate will generally issue, at the earliest, twenty-one days after the entry of the court of appeals' judgment (see Fed. R. App. P. 40(a)(1) (any petition for rehearing must be filed within fourteen days after entry of judgment); Fed. R. App. P. 41(b) (when no petition for rehearing filed, mandate issues seven days after expiration of time to file such petition)), the approach of the Fourth and Seventh Circuits results in prisoners who do not seek certiorari having as many as sixty-nine fewer days in which to file their Section 2255 motions than their counterparts in the other circuits to have addressed this issue.

As petitioner now shows, only the majority view is consonant with the text of Section 2255 and Congress's intent.

I. Only The Majority Interpretation of Section 2255 Comports With the Plain Meaning of "Final" and Congress's Intent.

1. Although there are many definitions of "final," the Seventh Circuit's construction of Section 2255 in cases in which no petition for certiorari is filed – that a "judgment of conviction becomes final" when the appellate mandate issues – conflicts with the only definition that makes sense. The issuance of the appellate mandate on direct appeal simply does not "allow[] no further doubt or dispute" (THE NEW OXFORD AMERICAN DICTIONARY 633 (2001)). Rather, further correction in this Court remains a distinct possibility.

The interpretation of Section 2255 adopted by the great majority of circuits is also supported by this Court's precedents, which have frequently addressed the meaning of "finality" in the context of post-conviction review. As far back as 1965, when this Court held that the rule of *Mapp* v. *Ohio*, 367 U.S. 643 (1961), did not apply retroactively to convictions that became final before *Mapp* was decided, this Court emphasized that "[b]y final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed." *Linkletter* v. *Walker*, 381 U.S. 618, 622 n.5 (1965). See also *United States* v. *Johnson*, 457 U.S. 537, 543 n.8 (1982) (considering retroactive effect of *Payton* v. *New York*, 445 U.S. 573 (1980), and quoting *Linkletter*'s definition of "final").

This Court has consistently adhered to this definition of "final" in its retroactivity jurisprudence, holding that a case "announces a new rule" – and thus is generally unavailable to a habeas petitioner – "if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague* v. *Lane*, 489 U.S. 288, 301 (1989) (plurality). The first step in any *Teague* analysis requires the court is to determine "the date on which the defendant's conviction and

sentence became final." *Caspari* v. *Bohlen*, 510 U.S. 383, 390 (1994). In *Caspari*, this Court reiterated that a state prisoner's conviction and sentence

> become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied. The Missouri Court of Appeals denied respondent's petition for rehearing on October 3, 1985, and respondent did not file a petition for a writ of certiorari. Respondent's conviction and sentence therefore became final on January 2, 1986 – 91 days (January 1 was a legal holiday) later.

Id. at 390-91 (citing *Griffith* v. *Kentucky*, 479 U.S. 314, 321 n.6 (1987)). Similarly, in *Lambrix* v. *Singletary*, which considered the retroactive effect of this Court's decision in *Espinosa* v. *Florida*, 505 U.S. 1079 (1992), this Court began its analysis by explaining that the petitioner's conviction had become final "on November 24, 1986, when his time for filing a petition for certiorari expired." 520 U.S. 518, 527 (1997).

This Court's repeated reliance on this definition of "final" in its retroactivity analysis is not merely "instructive" (*United States* v. *Burch*, 202 F.3d 1274, 1278 (CA10 2000)), but instead is directly relevant to the determination when a judgment of conviction becomes "final" for purposes of Section 2255. Specifically, with its definition of "final" for purposes of a retroactivity analysis, this Court has drawn a clear line to delineate between the stage in which a conviction and sentence are on direct review, on the one hand, and the stage in which they instead are subject to collateral attack.

Although Congress does possess "the authority to independently determine the standards to be applied under §§ 2244 and 2255" (*Gendron*, 154 F.3d at 674 (citing *Milwaukee* v. *Illinois*, 451 U.S. 304, 317 (1981))), there is no in-

dication that Congress intended the term "final," as used in Section 2255, to have any meaning other than "the Supreme Court's clear definition of that term in the context of habeas review" (*Kaufmann*, 282 F.3d at 1338). To the contrary, Congress expressly relied on this Court's definition of "final" in Section 2244(d)(1)(A), where it included "the date on which the judgment become final by the conclusion of direct review or the expiration of the time for seeking such review" as one of the events triggering the limitation period. The Seventh and Fourth Circuits' definition of "final" for purposes of Section 2255, by contrast, embraces a dichotomy that Congress surely could not have intended: a prisoner's conviction could become final under Section 2255, thus triggering the statute's one-year limitation period, ninety days before the same prisoner's conviction became "final" for purposes of a *Teague* retroactivity analysis, and during which time this Court could announce a constitutional rule that would be available to that prisoner on collateral review. Such a disparity might result in prisoners "fil[ing] habeas petitions before they know of all the possible Constitutional challenges available to them." *Garcia*, 210 F.3d at 1060 (internal citations omitted).

2. Nor is there any reason that Congress would have intended to tie the "finality" of a defendant's judgment of conviction uniquely to the issuance of the appellate mandate. The date on which the mandate is issued does *not* represent the date on which the court of appeals' decision is no longer subject to challenge *even in that forum*: the deadline to seek rehearing or rehearing *en banc* is seven days *before* the mandate issues (Fed. R. App. P. 41(b)); the deadline to seek certiorari in this Court is sixty-nine days *later* (Sup. Ct. R. 13.1). The "mandate" is instead "[a]n order from an appellate court directing a lower court to take a specified action." BLACK'S LAW DICTIONARY 973 (Deluxe 7th ed. 1999). Nothing about that directive bears any intrinsic relationship to the time for seeking post-conviction review.

The Seventh Circuit's interpretation also creates the implausible anomaly that a prisoner's conviction is in "superposition," simultaneously "final" and "non-final." The court of appeals in this case held that petitioner's conviction became final on December 15, 1998, twenty-one days after it rejected petitioner's direct appeal. But on that date, it was still entirely possible that petitioner would have filed a petition for certiorari and no one would have suggested that the time to file a Section 2255 motion had begun to run. There is no reason to believe that Congress designed the time limits of Section 2255 as such a test of Schrodinger's theorem. Cf. *Kusay* v. *United States*, 62 F.3d 192, 194 (CA7 1995) (Easterbrook, J.) ("Jurisdiction is unlike quantum mechanics. Elementary particles can both exist and not exist at the same time, with uncertainty resolved only by the act of observation (this is the point of Schrodinger's cat, which is both dead and alive until the experimenter opens the box). Judicial power needs a more predictable basis. Litigants and judges should be able to know, from facts observable at the time they act, which shell covers the pea. Otherwise time, energy, and money will be wasted because later events will require hearings to be held anew and opinions rewritten.").[2]

Congress thus acted against the backdrop of the settled rule that post-conviction proceedings ought not be instituted until no further relief is available on direct review. See, *e.g.*, *Feldman* v. *Henman*, 815 F.2d 1318, 1320-21 (CA9 1987) ("A district court should not entertain a habeas corpus petition while there is an appeal pending in [the court of appeals] or in

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[2] The Seventh Circuit's construction of Section 2255 para. 6 gives rise to a similar anomaly – that the judgment of conviction is simultaneously final and non-final – upon the conclusion of proceedings in the district court. On the Seventh Circuit's view, when the district court enters the judgment, that judgment is "final," and the one-year limitation period on any Section 2255 motion begins to run. But the judgment is also non-final at that time because the prisoner may still pursue a timely direct appeal.

the Supreme Court. The reason for the rule is that disposition of the appeal may render the [habeas corpus writ] unnecessary.") (internal quotation marks and citations omitted); *United States* v. *Gordon*, 634 F.2d 638, 638-39 (CA1 1980) ("[I]n the absence of 'extraordinary circumstances,' the 'orderly administration of criminal justice' precludes a district court from considering a § 2255 motion while review of the direct appeal is still pending."); *United States* v. *Davis*, 604 F.2d 474, 484 (CA7 1979) (same). Yet, the Fourth and Seventh Circuits implausibly presume that Congress intended to abrogate that principle. On their view, a federal prisoner properly may seek, and a federal district court should decide on the merits, a Section 2255 motion at any point after the issuance of the appellate mandate on direct review. They deem the defendant's judgment of conviction "final" as of that date, despite the fact that it is entirely possible that this Court will grant certiorari and reverse the appellate judgment.

The Fourth Circuit has nonetheless opined that its contrary holding is required because "literally nothing else * * * occurs" when the ninety-day time to seek certiorari expires. *Torres*, 211 F.3d at 839. The Fourth Circuit thus adverted to the absence of any formal, legal event triggering the one-year period to file a Section 2255 motion. But the expiration of the available time to seek certiorari is itself an event of considerable legal significance. To be sure, that event differs from the issuance of a mandate in that the petitioner does not receive formal notice, but statutes of limitation are almost never triggered by the issuance of formal legal process.

II. Petitioner's Construction of Section 2255 Best Accounts for Congress's Use of the Term "Final" in Section 2244.

At the same time that Congress in the AEDPA established a one-year limitation period for federal prisoners in Section 2255, it also created, in Section 2244(d)(1), a limitation period for state prisoners seeking collateral review of their sentences pursuant to Section 2254. See *Kapral* v. *United States*, 166 F.3d 565, 573 (CA3 1999). Thus, like Section 2255, Section 2244's one-year limitation period begins to run from the latest of four dates, each of which closely parallel the four dates outlined in Section 2255, para. 6.[3] Most important for present purposes, however, Section 2244(d)(1)(A) provides that – as with Section 2255's limitation period – the one-year period will generally begin to run from "the date on which the judgment became final." The statute provides: "The limitation period shall run from the latest of—(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. 2244(d)(1)(A). The courts of appeals have consistently construed judgments to be "final" for purposes of Section 2244(d)(1)(A), thereby triggering the one-year limitation period, when review in the Supreme Court has concluded or the time to seek such review has expired. See, *e.g.*, *Anderson* v. *Litscher*, 281 F.3d 672, 674-75 (CA7 2002); *Locke* v. *Saffle*, 237 F.3d 1269, 1273 (CA10 2001); *Williams* v. *Artuz*, 237 F.3d 147, 148-49 (CA2), *cert. denied*, 122 S. Ct. 279 (2001); *Coates* v. *Byrd*, 211 F.3d 1225, 1226 (CA11 2000), *cert. denied*, 531 U.S. 1166 (2001); *Bowen* v. *Roe*, 188 F.3d 1157, 1158-59 (CA9 1999); *Kapral* v. *United States*, 166 F.3d 565,

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[3] See 28 U.S.C. 2244(d)(1) ("The limitation period shall run from the latest of—(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review; (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant is prevented from filing by such State action; (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.").

575 (CA3 1999); *Smith* v. *Bowersox*, 159 F.3d 345, 348 (CA8 1998), *cert. denied*, 525 U.S. 1187 (1999).

Basic principles of statutory construction "assume[] that identical words used in different parts of the same act are intended to have the same meaning." *Sorenson* v. *Secretary of the Treasury*, 475 U.S. 851, 860 (1986) (internal quotations omitted). That conclusion is particularly apt with respect to the time limits of Sections 2254 and 2255: As the Fifth Circuit noted in *Flanagan* v. *Johnson*, 154 F.3d 196, 200 n.2 (1998), not only are "§ 2255 and § 2254 actions themselves * * * quite similar," such that they "should generally be read *in pari materia*," but "the limitation provisions for § 2255 motions and § 2254 petitions are virtually identical." Congress's use of the term "final" in both Section 2244(d)(1) and Section 2255 thus strongly suggests that a judgment becomes "final" for purposes of Section 2255 para. 6(1), thereby triggering the start of the one-year limitation period, only when review in the Supreme Court has concluded or the time to seek such review has expired. Moreover, the facts that Sections 2244 and 2255 both deal with the same issue – the limitation period for seeking collateral review – have the same purpose (see *Flanagan*, 154 F.3d at 200 n.2), and were enacted contemporaneously, are "especially damaging to any claim that 'the words, though in the same act, are found in such dissimilar connections as to warrant the conclusion that they were employed in the different parts of the act with different intent'" *Sorenson*, 475 U.S. at 860 (quoting *Helvering* v. *Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934))).

Although there is no reason to believe that Congress would have wanted to treat state and federal prisoners differently with regard to the limitation periods for seeking collateral relief pursuant to Sections 2254 and 2255, the only possible exception would be the fact that Section 2254 implicates the interest of the states in comity and the finality of their courts' judgments (see, *e.g.*, *Duncan* v. *Walker*, 533 U.S. 167 (2001)), such that Congress could conceivably have wanted

the limitation period for Section 2254 petitions to begin running *earlier*. The approach of the Fourth and Seventh Circuits, however, produces the opposite result: a potentially *longer* limitation period for state prisoners.[4]

2. In adopting the contrary view – that a conviction becomes "final" for purposes of Section 2255 para. 6(1) when the court of appeals issues its mandate on direct appeal – the Seventh Circuit relied heavily on this Court's reasoning in cases such as *Russello* v. *United States*, 464 U.S. 16 (1983), that when "Congress includes particular language in one section of an act but omits it in another section of the same act, it is presumed that Congress intended to exclude the language, and the language will not be implied where it has been excluded." *Gendron*, 154 F.3d at 674.

a. The Seventh Circuit erred because there is no relevant omission from Section 2255. Rather, as explained above, Congress in Section 2254 identified two circumstances in which a conviction becomes "final" and limited finality in the state post-conviction context to those two instances. If the omission suggests anything at all, it is that the "finality" under Section 2255 is not as constrained.

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[4] The Fourth Circuit's contrary reading of the statute simply rests on a false premise. That court reasoned in *Torres*: "The language Congress used [in Section 2244], 'by [i] the conclusion of direct review *or* [ii] the expiration of the time for seeking such review,' *expands the period of time* before the start of the limitation period for filing a habeas petition beyond the date that marks the conclusion of direct review of that judgment." 211 F.3d at 840 (emphasis added). The Fourth Circuit further reasoned that it was significant that Congress had not provided for a parallel "expan[sion]" of time in Section 2255. *Id.* In reality, however, the second clause of Section 2244(d)(1)(A) – "the expiration of time for seeking such review" – does not necessarily represent a date that is later in time. Whenever a petition for certiorari *is* filed, the latest date is instead "the conclusion of direct review."

Congress's specific directive in Section 2244(d)(1)(A) that the one-year limitation period will begin to run on "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review" is instead likely attributable to the lack of consensus among various states regarding the meaning of "finality." Compare, *e.g.*, *Warren* v. *State*, 833 S.W.2d 101, 102 (Tenn. Crim. App. 1992) (when state prisoner had not appealed conviction, "the statute of limitations [for seeking post-conviction relief] begins to run from the date of final conviction") with Mont. Code Ann. 46-21-102(1) (for purposes of state habeas proceedings, using definition of "finality" similar to that of 28 U.S.C. 2244(d)(1)(A)). In light of this lack of consensus, Congress may have "chose[n] to ensure uniformity by explaining what 'final' means in the context of a federal habeas petition that seeks to challenge a state court conviction." *Derman* v. *United States*, 298 F.3d 34, No. 01-2545, 2002 U.S. App. LEXIS 14909, at **15-16 (CA1 July 25, 2002). By contrast, the concept of "finality" "has a well-defined meaning in federal law." *Id.* at *15.

b. In any event, the *Russello* principle "is 'based on the hypothesis of careful draftsmanship.'" *Burch*, 202 F.3d at 1277 (citing *Kapral*, 166 F.3d at 579 (Alito, J., concurring)). In *Russello*, this Court interpreted 18 U.S.C. 1963(a)(1), which required any person convicted of violating Section 1962 of the Racketeering Influenced and Corrupt Organizations chapter to forfeit "any interest he has acquired or maintained in violation of section 1962." The petitioner argued that the statute "reache[d] only 'interests in an enterprise' and [did] not authorize the forfeiture of mere 'profits and proceeds.'" 464 U.S. at 20. This Court disagreed, based not only on its understanding of the meaning of the broad term "interest" but also on its comparison of the subsection with another provision in the same statute: Section 1963(a)(2), which required forfeiture only of "any interest in * * * any enterprise which [the defendant] has established[,] operated, controlled, conducted, or participated in the conduct of, in violation of

section 1962." This Court declined to "conclude[e] * * * that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship." *Id.* at 23.

In reaching its conclusion, this Court in *Russello* cited the legislative history of the two subsections, noting that an earlier version of the RICO legislation "had a single forfeiture provision for § 1963(a) that was limited to 'all interest in the enterprise'" but "later was divided into the present two subsections and the phrase 'in the enterprise' was excluded from the first. Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Id.* at 23-24.

The "hypothesis of careful draftsmanship" is sorely lacking in this case. This Court's recognition that, "in a world of silk purses and pigs' ears, the [AEDPA] is not a silk purse of the art of statutory drafting" (*Lindh* v. *Murphy*, 521 U.S. 320, 336 (1997)) has particular force with respect to Sections 2244 and 2255. For example, Section 2255 para. 8(1)'s requirement that a second or successive motion "must be certified as provided in section 2244 * * * to contain," *inter alia*, "newly discovered evidence" apparently is intended to incorporate the more stringent requirement, set out in Section 2244(b)(2)(B)(i), that "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence." Similarly, Section 2255 does not specifically prohibit claims presented in a prior petition; rather, such claims are prohibited only by implication, through the incorporation of Section 2244(b)(1). Accord *Alexander* v. *United States*, 121 F.3d 312, 314 (CA7 1997) ("The reference [in Section 2255] to § 2244 also activates an additional limit in that section: 'A claim presented in a second or successive * * * application * * * that was presented in a prior application shall be dismissed.'"). Courts have further construed Section 2255 as incorporating various procedural require-

ments established in Section 2244(b). See, *e.g.*, *Reyes-Requena* v. *United States*, 243 F.3d 893, 897 (CA5 2001) (Section 2255 incorporates Sections 2244(b)(3)(C) – which conditions authorization to file a second or successive petition on a prima facie showing of the petition's adequacy – and 2244(b)(4), which requires a district court to dismiss claims in an authorized second or successive petition "unless the applicant shows that the claim satisfies the requirements of" Section 2244); *Bennett* v. *United States*, 119 F.3d 468, 469-70 (CA7 1997) (Posner, C.J.) (same; court notes that "the legislative history does not distinguish between second or successive motions by federal and by state prisoners, and we cannot think of any reason why the standard for federal prisoners would be more stringent").

Further, unlike the provisions at issue in *Russello*, nothing in the legislative history indicates that Congress ever intended to create different limitation periods for federal and state prisoners.

A predecessor proposal to the AEDPA, the Violent Crime Control and Law Enforcement Improvement Act of 1995, included an amendment to Section 2255 that was, for present purposes, identical to the one eventually implemented by the AEDPA – that is, it created a limitation period for Section 2255 motions that would have run from the latest of four dates, including "the date on which the judgment of conviction becomes final." S.3, 104th Cong. § 508 (1995) (hereinafter "S.3"). The bill also proposed to amend Section 2244 to impose a one-year limitation period for state prisoners to file federal habeas petitions. However, although three of the four dates from which the limitation period could begin to run largely paralleled those eventually implemented by the AEDPA,[5] the limitation period would have begun to run not

[5] The one-year limitation period would have begun to run from, *inter alia*:

when the judgment became final, but instead from "the date on which State remedies are exhausted." S.3, 104th Cong. § 508.

A subsequent proposal, the Habeas Corpus Reform Act of 1995, S.623, similarly included the limitation period later adopted in the AEDPA for Section 2255 motions. S.623, 104th Cong. § 6(2) (1995). S.623's proposed amendment to Section 2244 differed from that of S.3, however, in that it – like the AEDPA – provided for the limitation period to begin to run from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review," rather than from "the date on which State remedies are exhausted." S.623, 104th Cong. § 2 (1995). In his remarks introducing the bill, Senator Specter (one of the bill's co-sponsors) emphasized that the proposed changes were necessary to "impose strict time limits on appeals," and to "address the endless delays caused by requiring defendants to exhaust all of their claims in State court before they are allowed to file federal habeas corpus petitions." 141 Cong. Rec. S4591-92 (daily ed. Mar. 24, 1995). "Based on these remarks, it is reasonable to infer that the reason for the new approach taken in S.623 was to force state prisoners, upon the completion of direct review, promptly to commence

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(2) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, where the applicant was prevented from filing by such State action;

(3) the date on which the Federal constitutional right asserted was initially recognized by the Supreme Court, where the right has been newly recognized by the Court and is made retroactively applicable; or

(4) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

S.3, 104th Cong. § 508 (1995).

either a state post-conviction relief proceeding (which would toll the limitation period) or a federal habeas proceeding." *Kapral*, 166 F.3d at 580-81 (Alito, J., concurring).

In April 1995, Senators Dole and Hatch introduced the Comprehensive Terrorism Prevention Act of 1995, S.735, 104th Cong. (1995). The bill included the habeas corpus reform provisions proposed in S.623 (see, *e.g.*, 141 Cong. Rec. S7585 (daily ed. May 26, 1995)), and the version that eventually passed in both houses and was signed into law as the AEDPA proposed changes to Section 2244 and 2255's limitation periods that were virtually identical to those contemplated by S.623. At no point was there any indication that Congress intended that the limitation periods for federal and state prisoners begin running at different times, much less that federal prisoners have a shorter time in which to seek collateral review. To the contrary, the Conference Report for S.735 indicates only that the bill "sets a one year limitation on an application for a habeas writ * * * ." H.R. Rep. No. 104-518, at 11 (1996), *reprinted in* 1996 U.S.C.C.A.N. 924, 944. See also 142 Cong. Rec. H3606 (daily ed. Apr. 18, 1996) ("I introduced this legislation * * * to impose a statute of limitations on the filing of habeas corpus petitions.") (statement of Rep. Hyde).

Thus, as Judge Alito concluded in his concurring opinion in *Kapral*, "the legislative history suggests that this difference in language" was not a deliberate choice by Congress to impose different limitation periods for federal and state prisoners," but was "instead a product of the vagaries of the legislative process." 166 F.3d at 581.

In any event, the Fourth and Seventh Circuits' interpretation of the limitation period prescribed by Section 2255 conflicts with the *Russello* principle – *viz.* that courts should not imply statutory language contained in a related provision when it has been omitted by Congress. Those courts hold that, in cases in which no petition for certiorari is filed, a conviction becomes final upon the issuance of the court of appeals' mandate on direct review – *i.e.*, upon "the conclusion of direct review." Yet, under the *Russello* principle, the fact that Congress employed that meaning of "finality" in Section 2254 would preclude its application to Section 2255. As the Tenth Circuit noted in *United States* v. *Burch*, "[h]ad the *Gendron* court truly applied the *Russello* principle and taken it to its logical conclusion, it would have held that a judgment of conviction is final for purposes of § 2255 when the trial court enters the judgment of conviction on the docket." 202 F.3d 1274, 1278 (2000). Accord *United States* v. *Garcia*, 210 F.3d 1058, 1060 (CA9 2000) (O'Scannlain, J.) ("[T]he canon of construction invoked by the Seventh Circuit does not apply because we cannot avoid implying at least part of the language from § 2244(d)(1) into § 2255.").

c. At bottom, the premise underlying the Fourth and Seventh Circuits' contrary reading of the statute is that Congress intended to interpose the shortest possible deadline for seeking review under Section 2255. But, as noted, that view is belied by Section 2244, under which state prisoners have one year from the expiration of the time to seek certiorari before filing motions under Section 2254. Further, nothing in the legislative history articulates the intent that the Fourth and Seventh Circuits attribute to Congress. "The 'Great Writ' occupies far too important a place in our jurisprudence to justify" the Fourth and Seventh Circuits' assumption to the contrary. See *Kapral* v. *United States*, 166 F.3d 565, 573 (CA3 1999).

d. Finally, the interpretation advanced by petitioner, the United States, and five courts of appeals is entirely consistent with the purpose of the AEDPA: "to constrain the filing of habeas petitions by imposing a time limitation where none existed before." *Burch*, 202 F.3d at 1276 (citing *Kapral*, 166 F.3d at 571 & n.4)). If a federal prisoner does not file a petition for a writ of certiorari, and Section 2255's limitation period begins to run when the time for seeking certiorari expires, it is beyond peradventure that the "time limitation"

which was at the very heart of the AEDPA is in place: the prisoner must file any Section 2255 motion within one year of the expiration of the time for seeking certiorari. "Recognizing that one is allowed 90 days to file a petition for certiorari does not mitigate the congressional objective of imposing time limits where none previously existed." *Kapral*, 166 F.3d at 571.

Indeed, petitioner's interpretation of Section 2255 not only serves the purposes of the AEDPA, but it also allows federal prisoners, like their state counterparts, to make an informed decision whether to file a petition for a writ of certiorari and the likelihood of any such petition's success, without the concern that their failure to seek certiorari will then reduce the time in which to seek collateral review of their conviction and sentence. Accord *Kaufmann* v. *United States*, 282 F.3d 1336, 1338 (CA11 2002). By contrast, the Seventh and Fourth Circuits' interpretation of Section 2255 may encourage federal prisoners "to file plainly frivolous petitions for certiorari for the sole purpose of extending their time for habeas review" (*id.*), thereby further burdening this Court with additional meritless petitions for certiorari from the more than ten thousand federal prisoners who seek direct review of their convictions and sentences in the courts of appeals each year (see 2001 ANNUAL REPORT OF THE DIRECTOR, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, tbl. B-1A).

III. Only Petitioner's Interpretation Is Consistent With the Scheme Employed by Congress in Section 2263.

If the Fourth and Seventh Circuits were correct that Congress intended the time to seek post-conviction review to commence when the court of appeals' mandate issued on direct review, it would have used the scheme it employed in 28 U.S.C. 2263. That section sets out an expedited limitation period for commencing post-conviction review in capital

cases from states that meet certain criteria.[6] Under Section 2263(a), prisoners subject to that provision must file any application for federal habeas relief "not later than 180 days after *final* State court *affirmance* of the conviction and sentence on direct review or the expiration of the time for seeking such review" (emphasis added). Section 2263(b)(1) further tolls the 180-day limitation period "from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition."[7]

Section 2263 thus sets up a scheme very similar to the one that the Fourth and Seventh Circuits imagined Congress created in Section 2255. Section 2263 expressly directs, in those cases to which it applies, that the time to seek post-conviction review runs from the final appellate ruling prior to any disposition by this Court. Congress then allowed for review in this Court by tolling the 180-day limitation period while a petition for certiorari is pending. By contrast, Congress provided in Section 2255 that the one-year time to seek post-conviction review runs *not* from "final * * * affirmance of the conviction and sentence on direct review" (Section 2263(a)) but rather from "the date on which the judgment of conviction becomes final" (Section 2255 para. 6(1)). "Had Congress intended the limitations period to begin upon the conclusion of an appeal

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[6] Sections 2261-66 collectively form Chapter 154, "Special Habeas Corpus Procedures in Capital Cases," of Title 28. Pursuant to Chapter 154, states may trigger certain procedural rules – including a shorter limitation period in which state prisoners may file a federal habeas petition (28 U.S.C. 2263(a)) and expedited decisions by federal courts (*id.* § 2266(b)-(c)) – by creating a system to appoint counsel for capital defendants in state post-conviction proceedings that meets specified requirements. See 28 U.S.C. 2261.

[7] The tolling provision applies if the "State prisoner files the petition to secure review by the Supreme Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review." 28 U.S.C. 2263(b)(1).

as of right, it would have provided for tolling to allow for a petition for certiorari to be acted upon, just as it did in [Section 2263(b)(1)]." *Kapral*, 166 F.3d at 576-77.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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September 11, 2002

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[Filed 3/30/98]

GENERAL DOCKET FOR NO. 98-1783

United States of America,
Plaintiff-Appellee,

v.

Erick Cornell Clay,
Defendant-Appellant.

SELECTED DOCKET ENTRIES

DATE	PROCEEDINGS
3/30/98	Criminal case docketed. [98-1783] [1047245-1] Transcript information sheet due 4/9/98. Appellant's brief due 5/11/98 for Erick Cornell Clay. (land)
3/30/98	Filed Appellant Erick Cornell Clay docketing statement. [98-1783] [1047253-1] (land)
10/9/98	Case heard and taken under advisement by panel: Circuit Judge Jesse E. Eschbach, Circuit Judge Ilana D. Rovner, Circuit Judge Diane P. Wood. [98-1783] [1111564-1] (broo)

11/23/98	Filed Circuit Rule 53 order PER CURIAM. AFFIRMED. Circuit Judge Jesse E. Eschbach, Circuit Judge Ilana D. Rovner, Circuit Judge Diane P. Wood. [98-1783] [1047245-1] (jame)
11/23/98	ORDER: Final judgment filed per C.R. 53 order. With costs: n. [98-1783] [1122050-1] (jame)
12/15/98	MANDATE ISSUED AND ENTIRE RECORD RETURNED. (Contents returned: 1 vol. pleadings; 2 vol. transcripts; 1 vol. exhibits; 2 sealed envelopes.) [98-1783] [1047245-1] (cove)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

ERIC[K] C. CLAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Cause No. 3:00CV117RM
Arising from 3:97CR46RM

MEMORANDUM AND ORDER

This cause comes before the court on plaintiff Erick C. Clay's motion under 28 U.S.C. § 2255, together with his petition for leave to amend his § 2255 petition.

Mr. Clay was sentenced on March 18, 1998 to concurrent terms of 137 months for arson and distribution of a Schedule II controlled substance, to be followed by a three-year period of supervision. The United States Court of Appeals for the Seventh Circuit affirmed his conviction and sentence on November 23, 1998. Mr. Clay filed his § 2255 petition on February 22, 2000, claiming he was denied the effective assistance of trial counsel and that the indictment for arson was defective. In his amended § 2255 petition Mr. Clay seeks to add claims that his sentence violates the Ex Post Facto Clause and the Fifth Amendment of the United States Constitution and that he received ineffective assistance of counsel during his plea bargaining stage.

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which became effective April 24, 1996,

contains a one-year statute of limitations for petitions filed pursuant to 28 U.S.C. § 2255. The one-year period runs from the latest of:

> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
>
> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. § 2255.

When a federal prisoner does not seek certiorari with the Supreme Court, the conviction becomes "final" on the date the appellate court issues the mandate in the direct appeal. *See Gendron v. United States*, 154 F.3d 672, 674 (7th Cir. 1998), *cert. denied*, 119 S. Ct. 1758 (1999); *see also United States v. Marcello*, Nos. 99-2294, 99-2451, 2000 WL 580669, at *2 (7th Cir. May 15, 2000) ("For defendants who try unsuccessfully to take their case to the Supreme Court, their judgments of conviction become final on the date their petitions for certiorari are denied."); *United States v. Torres*, 211 F.3d 836, 838-841 (4th Cir. 2000). *But see United States v. Garcia*, 210 F.3d 1058-1060 (9th Cir. 2000); *United States v. Gamble*, 208 F.3d 536, 536-537 (5th Cir. 2000); *United States v. Burch*, 202 F.3d 1274, 1279 (10th Cir. 2000); *Kapral v. United States*, 166 F.3d 565, 577 (3d Cir. 1999). Nothing indicates that Mr. Clay sought Supreme Court review. The

clerk of the court of appeals sent the mandate to this court on December 15, 1998; the mandate bore the date of November 23, 1998, which was also the date of the appellate decision. Therefore, at least according to the record before the court, Mr. Clay had until, at the latest, December 15, 1999 to file his § 2255 petition. Because Mr. Clay's § 2255 petition was not filed until February 22, 2000, more than two months past this filing date, Mr. Clay's petition would seem to be time-barred.[1] His proposed amendment to the petition (if the amendment itself would be capable of surviving a timeliness analysis) would not seem likely to make the original petition any more or less timely.

This timeliness issue was not raised in the government's response. Fairness demands that Mr. Clay have an opportunity to be heard on the issue. The issue's absence may be due to the government's awareness of some matter that makes the present appearance misleading; since the government would have to defend a dismissal on these grounds on appeal, fairness demands that the government, too, have an opportunity to be heard on the issue. Accordingly, the court AFFORDS the parties twenty days – to and including July 11, 2000 – within which to show cause why Mr. Clay's petition should not be dismissed as untimely.

---

[1] Where a petitioner's conviction became final prior to the enactment of the AEDPA, the petitioner had until April 23, 1997, one year from the AEDPA's enactment, to file his motion under 28 U.S.C. § 2255. *See Lindh v. Murphy*, 96 F.3d 856, 866 (7th Cir. 1996) (en banc), reversed on other grounds, 117 S. Ct. 2059 (1997). Because Mr. Clay's conviction occurred well after the enactment date of the AEDPA, Mr. Clay is not entitled to any grace period for filing his § 2255 petition.

SO ORDERED.

ENTERED: June 21, 2000

Robert L. Miller, Judge
United States District Court

cc: AUSA Hays
Clay

No. 01-1500

In the Supreme Court of the United States

ERICK CORNELL CLAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

The Court granted certiorari limited to the following question:

Whether petitioner's judgment of conviction became "final" within the meaning of 28 U.S.C. 2255 para. 6(1) when the court of appeals issued its mandate on direct appeal or when his time for filing a petition for a writ of certiorari expired.

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In the Supreme Court of the United States

No. 01-1500

ERICK CORNELL CLAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is unpublished but is available at 30 Fed. Appx. 607.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 2002. The petition for a writ of certiorari was filed on April 5, 2002, and was granted on June 28, 2002. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Paragraph 6 of 28 U.S.C. 2255, which establishes the statute of limitations for motions for collateral relief filed by federal prisoners, provides:

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. 2255 para. 6.

2. Section 2244(d)(1) of Title 28 of the United States Code, which provides the general statute of limitations for federal habeas petitions filed by state prisoners, provides:

A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. 2244(d)(1).

3. Section 2263 of Title 28 of the United States Code, which provides the statute of limitations for habeas petitions filed by prisoners subject to capital sentences in States that qualify for expedited collateral review procedures, provides:

(a) Any application under this chapter for habeas corpus relief under section 2254 must be filed in the appropriate district court not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review.

(b) The time requirements established by subsection (a) shall be tolled—

(1) from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition if a State prisoner files the petition to secure review by the Supreme

Court of the affirmance of a capital sentence on direct review by the court of last resort of the State or other final State court decision on direct review;

(2) from the date on which the first petition for post-conviction review or other collateral relief is filed until the final State court disposition of such petition; and

(3) during an additional period not to exceed 30 days, if—

(A) a motion for an extension of time is filed in the Federal district court that would have jurisdiction over the case upon the filing of a habeas corpus application under section 2254; and

(B) a showing of good cause is made for the failure to file the habeas corpus application within the time period established by this section.

28 U.S.C. 2263.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioner was convicted of arson, in violation of 18 U.S.C. 844(i), and distributing crack cocaine, in violation of 21 U.S.C. 841(a)(1). Pet. App. 2a. He was sentenced to 137 months of imprisonment, to be followed by three years of supervised release. *Ibid.*; *United States* v. *Clay*, 165 F.3d 33 (Table), No. 98-1783, 1998 WL 847098, at *2 (7th Cir. Nov. 23, 1998). The court of appeals affirmed his convictions. Pet. App. 2a. The district court denied petitioner's motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence, but issued him a certificate of appealability. Pet. App. 2a-3a. The court of appeals affirmed the denial of the Section 2255 motion. *Id.* at 1a-6a.

1. During the summer of 1996, petitioner began selling crack cocaine to Tammy Sue Herring, who lived in a rented room in a house in South Bend, Indiana. Pet. App. 2a. In an apparent effort to force Herring to pay her drug debt to him, petitioner set the residence on fire and thereby caused severe damage. *Ibid.*

A federal grand jury in the Northern District of Indiana returned a two-count indictment that charged petitioner with arson, in violation of 18 U.S.C. 844(i), and distributing crack cocaine, in violation of 21 U.S.C. 841(a)(1). Pet. App. 2a. On December 30, 1997, a petit jury found petitioner guilty of both charges, and the district court sentenced him to 137 months of imprisonment, to be followed by three years of supervised release. *Ibid.*; 1998 WL 847098, at *2.

2. On November 23, 1998, the United States Court of Appeals for the Seventh Circuit affirmed petitioner's convictions in an unpublished order. Pet. App. 2a. On December 15, 1998, the court of appeals issued its mandate. *Ibid.* Petitioner did not file a petition for a writ of certiorari. *Ibid.*

3. On February 22, 2000, petitioner, acting *pro se*, filed a motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence. Petitioner argued that the indictment under which he was convicted failed to allege that he possessed the mental state necessary to be guilty of arson and that his trial counsel rendered constitutionally ineffective assistance in various respects. Motion under 28 U.S.C. 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody 5-6, 8. The government filed a response to the Section 2255 motion in which it argued that petitioner's

claims were "completely meritless." Gov't Response to Petitioner's 2255 Motion to Vacate, Set Aside, or Correct Sentence 1. On May 4, 2000, petitioner filed a motion for leave to amend his Section 2255 motion. Motion for Leave to Amend 1. Petitioner proposed to amend his Section 2255 motion to add two new claims —that his sentence violated the Ex Post Facto Clause of the Fifth Amendment and that another of his trial counsel's actions constituted ineffective assistance. Amended Motion to Vacate Judgment or Sentence 1-2, 7-8.

On June 21, 2000, the district court filed a memorandum and order in which the court observed that 28 U.S.C. 2255 contains a limitation provision requiring, in pertinent part, that a federal prisoner file any motion for relief under Section 2255 within one year after his judgment of conviction becomes final. 6/21/00 Order 2. The court noted that "[petitioner's Section 2255] petition would seem to be time-barred" because he filed it more than one year after the court of appeals issued the mandate in his direct appeal, and because petitioner did not seek a writ of certiorari from this Court. *Id.* at 3. The court directed the parties "to show cause why [petitioner's Section 2255] petition should not be dismissed as untimely." *Id.* at 4.

The government filed a response to the court's memorandum and order in which the government acknowledged that petitioner's Section 2255 motion was untimely under Seventh Circuit law. Gov't Response to the Dist. Ct. Mem. and Order of June 21, 2000, at 1. The government explained, however, that the United States disagrees with the Seventh Circuit's interpretation of Section 2255's limitation provision and instead takes the position that "a conviction does not become 'final' under [Section] 2255 until expiration of the time allowed for

certiorari review by the Supreme Court." *Id.* at 2 (quoting *Kapral* v. *United States*, 166 F.3d 565, 566 (3d Cir. 1999)). The government noted that "[p]etitioner's Section] 2255 [p]etition would be timely" under that construction of Section 2255. *Ibid.*

The district court denied petitioner's Section 2255 motion and motion to amend. Pet. App. 7a-9a. Relying on *Gendron* v. *United States*, 154 F.3d 672, 674 (7th Cir. 1998) (per curiam), cert. denied, 526 U.S. 1113 (1999), the court stated that, "when a federal prisoner in this circuit does not seek certiorari * * *, the conviction becomes 'final' on the date the appellate court issues the mandate in the direct appeal." Pet. App. 8a. Because petitioner did not file his Section 2255 motion until more than one year after that date, the court denied the motion as time-barred and rejected petitioner's subsequent motion to amend. *Id.* at 8a-9a. The court declined to excuse the late filing under the doctrine of equitable tolling (which petitioner had not raised) and denied petitioner's alternative request for relief under Rule 60(b) of the Federal Rules of Civil Procedure. *Ibid.* The court issued a certificate of appealability limited to the question "whether [petitioner's] Sixth Amendment right to effective assistance of counsel was violated." 9/13/00 Order 2.

4. On January 25, 2002, the court of appeals issued an unpublished order in which it affirmed the judgment of the district court dismissing petitioner's Section 2255 motion. Pet. App. 1a-6a. The court noted that it had stricken petitioner's first appellate brief because that brief had failed to address the Sixth Amendment claims for which the district court had issued the certificate of appealability. *Id.* at 3a. The court further noted that, although it had ordered petitioner to address those claims, his second brief addressed only the question

whether the district court properly dismissed his Section 2255 motion as untimely. *Ibid.* The court concluded, however, that it did not need to address the merits of petitioner's Sixth Amendment claims because it agreed with the district court's determination that petitioner's Section 2255 motion was untimely. *Ibid.*

The court of appeals noted that it had previously held in *Gendron*, *supra*, that "federal prisoners who decide not to seek certiorari with the Supreme Court will have the period of limitations begin to run on the date this court issues the mandate in their direct criminal appeal." Pet. App. 5a (quoting *Gendron*, 154 F.3d at 674). The court declined petitioner's "invitation to reconsider [its] holding in *Gendron*," although the court acknowledged that its "construction of section 2255 represents the minority view." *Ibid.* After stating that petitioner had filed his Section 2255 motion "sixty-nine days too late," the court "f[ou]nd that the district court was correct when it denied the motion." *Id.* at 6a.

SUMMARY OF ARGUMENT

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214, requires a federal prisoner seeking collateral relief under 28 U.S.C. 2255 to file the motion within one year of the latest of several dates, including, as relevant here, "the date on which the judgment of conviction becomes final." 28 U.S.C. 2255 para. 6(1). The word "final" is not defined in Section 2255, but "final" has a well-settled background meaning in the law of collateral review. As this Court has made clear in delineating when decisions announcing new rules of criminal procedure are applicable to a particular case, a criminal case becomes "final" for purposes of collateral review when "a judgment of conviction has been rendered, the

availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Griffith* v. *Kentucky*, 479 U.S. 314, 321 n.6 (1987); see *Caspari* v. *Bohlen*, 510 U.S. 383, 390 (1994) (applying that definition for purposes of retroactivity analysis under *Teague* v. *Lane*, 489 U.S. 288 (1989)). That meaning of "final"—one that deems a case to be final when the time for filing a certiorari petition elapses (if no petition is filed)—is the logical definition to apply to the AEDPA's statute of limitations as well.

A. The court of appeals' position—that a case becomes final (for a federal prisoner who does not seek certiorari) when the appellate mandate issues—departs from the background definition in this Court's collateral review cases and is unsupported by the structure of the AEDPA. "Final" appears not just in Section 2255 para. 6(1) but also in 28 U.S.C. 2244(d)(1)(A), the parallel limitation provision applicable to state prisoners seeking collateral relief under 28 U.S.C. 2254. Section 2244(d)(1)(A), which was enacted simultaneously with Section 2255 para. 6 as part of the AEDPA, identifies the date that a judgment becomes "final" as "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." The courts of appeals have uniformly interpreted "direct review" in Section 2244(d)(1)(A) to encompass review of the conviction by this Court. Thus, when a state prisoner does not petition this Court for certiorari following the affirmance of his conviction in the highest state court, the judgment becomes final when his time for seeking certiorari in this Court expires. Given the similar purpose, language, and structure of the two limitation provisions, the background definition of "final" in this Court's cases, and the presumption that words have the

same meaning throughout a statute, the definition of "final" in Section 2244(d)(1)(A) is equally applicable to Section 2255.

B. Interpreting Section 2255 para. 6(1) to mean that a judgment becomes "final" when the time expires for seeking certiorari furthers the orderly administration of direct and collateral review proceedings and accords with the AEDPA's purpose. That interpretation ensures that all direct review has concluded before a defendant shifts his focus to post-conviction relief. It is therefore consistent with the longstanding rule that collateral review is inappropriate while a case is still pending on direct review. The interpretation also ensures that the law that will govern a Section 2255 motion is settled before the limitation period for the filing of the motion commences. And it sensibly gives similarly-situated state and federal prisoners the same amount of time in which to commence collateral review proceedings.

The conclusion that a judgment of conviction becomes "final" for purposes of Section 2255 para. 6(1) when the time expires to seek review in this Court also accords with the AEDPA's purpose of limiting the time in which a prisoner may initiate post-conviction proceedings. Because the mandate normally issues 21 days after the court of appeals enters judgment, the difference between that interpretation and a construction under which a conviction becomes final when the court of appeals issues its mandate is, in most cases, only 69 days. That relatively brief period is unlikely to slow the collateral review process in any meaningful way. In fact, the alternative approach could result in more substantial delay by creating a strong incentive for prisoners to file petitions for certiorari merely to extend the time for commencing collateral attack.

C. The Fourth and Seventh Circuits—relying on the maxim *expressio unius est exclusio alterius*—compared the language of Sections 2244 and 2255 and concluded, by negative implication, that the term "final" in Section 2255 does not include the time in which a prisoner may (but does not) seek further direct review. That negative inference is flawed, however. If one were to draw a negative inference from the difference between Sections 2244 and 2255, the logical conclusion would not be the one reached by the Fourth and Seventh Circuits —that finality in Section 2255 includes one portion, but not all, of Section 2244's definition of final. Rather, the logical conclusion would be that Section 2255's definition of finality includes neither portion of Section 2244's definition. That is, finality under Section 2255 would entail neither "the conclusion of direct review" nor "the expiration of the time for seeking such review." Under that interpretation of Section 2255, a federal prisoner's judgment of conviction would become "final" immediately upon the district court's entry of the judgment. No court has adopted that construction of Section 2255, which would require many federal prisoners to commence their collateral attacks while their direct appeals were still pending. This Court has counseled against reliance on the *expressio unius* maxim where, as here, it would produce such illogical results. See, *e.g.*, *Chevron U.S.A. Inc.* v. *Echazabal*, 122 S. Ct. 2045, 2051 (2002). The more sensible and more natural inference is that the definition of "final" in Section 2244 also applies under Section 2255, as both involve the collateral review setting in which this Court has already defined the term final.

The difference in language between Section 2255 and 28 U.S.C. 2263 also fails to support the approach adopted by the Fourth and Seventh Circuits. Section

2263 requires state capital defendants in States qualifying for expedited collateral review procedures to file their habeas petitions within 180 days "after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review." Section 2255 para. 6(1) refers to *neither* of the two events that Section 2263 identifies as possible starting points for the limitation period—"affirmance of the conviction and sentence on direct review" and "the expiration of the time for seeking such review." Thus, reasoning by negative implication from Section 2263 does not justify the conclusion that the limitation period in Section 2255 para. 6(1) begins to run at one of those times rather than the other. Moreover, the limitation period in Section 2263 runs not from when the conviction "becomes final," but from "State court affirmance." Accordingly, there is no reason to infer that Congress rejected in Section 2255 an approach that it incorporated into Section 2263, and the distinctions between those sections do not support the reading of Section 2255 adopted by the Fourth and Seventh Circuits.

D. When one applies the correct definition of "final," it is clear that petitioner's Section 2255 motion was timely filed. Because petitioner did not file a petition for a writ of certiorari to review his direct appeal, his judgment of conviction became final when the time within which he could have filed a petition expired. That occurred on February 22, 1999, 90 days after the court of appeals affirmed his convictions. Petitioner filed his Section 2255 motion on February 22, 2000, exactly one year later. The court of appeals thus erred in holding that petitioner's motion was untimely.

ARGUMENT

WHEN A DEFENDANT DOES NOT PETITION THIS COURT FOR A WRIT OF CERTIORARI ON DIRECT APPEAL, HIS CONVICTION BECOMES "FINAL" FOR PURPOSES OF 28 U.S.C. 2255 WHEN THE TIME FOR SEEKING CERTIORARI EXPIRES

Before the enactment in 1996 of the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. 104-132, 110 Stat. 1214, there was no statute of limitations on the filing of federal motions for collateral relief. See *Vasquez* v. *Hillery*, 474 U.S. 254, 265 (1986) (noting the absence of a statute of limitations in a case involving a habeas petition by a state prisoner under 28 U.S.C. 2254); *United States* v. *Nahodil*, 36 F.3d 323, 327-328 (3d Cir. 1994) (applying *Vasquez* to a motion for collateral relief by a federal prisoner under 28 U.S.C. 2255); 28 U.S.C. 2255 (1994) (stating that "[a] motion for such relief may be made at any time"). The only timeliness constraint was the court's authority to dismiss the motion if the government had "been prejudiced in its ability to respond to the motion by delay in its filing." 28 U.S.C. 2255 Rule 9(a). As a result, a prisoner could "wait a decade" or more after his conviction before seeking collateral relief. *Lindh* v. *Murphy*, 96 F.3d 856, 866 (7th Cir. 1996) (en banc), rev'd on other grounds, 521 U.S. 320 (1997).

Concerned that existing rules did not sufficiently protect the finality of criminal judgments, Congress imposed statutes of limitations when it enacted the AEDPA. Section 105 of the AEDPA, 110 Stat. 1220, establishes a "1-year period of limitation" for Section 2255 motions by federal prisoners. See 28 U.S.C. 2255 para. 6. The one-year period runs from "the latest of" four specified events. The relevant triggering event for

this case is "the date on which the judgment of conviction becomes final." 28 U.S.C. 2255 para. 6(1).[1] The AEDPA does not, however, define when a judgment of conviction becomes "final" for purposes of Section 2255 para. 6(1).[2]

The courts of appeals have uniformly concluded that, when a federal prisoner pursues all available avenues for direct review, including filing a petition for a writ of certiorari in this Court, the judgment of conviction becomes final only when this Court denies the writ or affirms the conviction and sentence on the merits.[3] The

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[1] Section 2255 para. 6(1) provides:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
>
> (1) the date on which the judgment of conviction becomes final * * *.

28 U.S.C. 2255 para. 6.

[2] The AEDPA also does not define the term "judgment of conviction." In general, a federal prisoner's "judgment of conviction" includes both the adjudication of guilt and the sentence. See Fed. R. Crim. P. 32(d)(1); *Deal* v. *United States*, 508 U.S. 129, 132 (1993). The courts of appeals have applied that general definition to the term as used in Section 2255. See, *e.g.*, *Kapral* v. *United States*, 166 F.3d 565, 569 (3d Cir. 1999).

[3] See *United States* v. *Hicks*, 283 F.3d 380, 387 (D.C. Cir. 2002); *Rogers* v. *United States*, 180 F.3d 349, 352 (1st Cir. 1999), cert. denied, 528 U.S. 1126 (2000); *Green* v. *United States*, 260 F.3d 78, 84 (2d Cir. 2001); *Kapral* v. *United States*, 166 F.3d 565, 577 (3d Cir. 1999); *United States* v. *Segers*, 271 F.3d 181, 186 (4th Cir. 2001), cert. denied, 122 S. Ct. 1331 (2002); *United States* v. *Thomas*, 203 F.3d 350, 355 (5th Cir. 2000); *Johnson* v. *United States*, 246 F.3d 655, 657 (6th Cir. 2001) ("[a]s a general rule"); *Horton* v. *United States*, 244 F.3d 546, 550-551 (7th Cir. 2001); *United States* v. *Colvin*, 204 F.3d 1221, 1223 n.2 (9th Cir. 2000) (dictum); *United States* v. *Simmonds*, 111 F.3d 737, 744 (10th Cir. 1997); *Washington* v. *United States*, 243 F.3d 1299, 1300 (11th Cir. 2001). The Eighth Circuit has not addressed the issue.

courts of appeals have divided, however, over the question presented in this case—when a judgment of conviction becomes "final" under 28 U.S.C. 2255 para. 6(1) in cases in which the defendant files an unsuccessful appeal but does not petition for a writ of certiorari. Six circuits have held that a conviction becomes final when the time for filing a petition for a writ of certiorari expires. See *Derman* v. *United States*, 298 F.3d 34, 39-42 (1st Cir. 2002), petition for cert. pending, No. 02-5907 (filed May 28, 2002); *Kaufmann* v. *United States*, 282 F.3d 1336, 1337-1339 (11th Cir. 2002); *United States* v. *Garcia*, 210 F.3d 1058, 1059, 1061 (9th Cir. 2000); *United States* v. *Gamble*, 208 F.3d 536, 537 (5th Cir. 2000); *United States* v. *Burch*, 202 F.3d 1274, 1276-1279 (10th Cir. 2000); *Kapral* v. *United States*, 166 F.3d 565, 570-577 (3d Cir. 1999). The Fourth and Seventh Circuits, however, have held that the judgment in such cases becomes final on the date that the court of appeals issues its mandate on direct review. See *United States* v. *Torres*, 211 F.3d 836, 839-842 (4th Cir. 2000); *Gendron* v. *United States*, 154 F.3d 672, 673-675 (7th Cir. 1998) (per curiam), cert. denied, 526 U.S. 1113 (1999).

The conclusion of the majority of the circuits is correct. Consistent with the text of the AEDPA and the definition of finality long-approved by this Court in the context of post-conviction review, a federal judgment of conviction becomes "final" for purposes of Section 2255 para. 6(1) only when the possibility of further direct review is exhausted. Thus, when a defendant does not file a petition for certiorari, the judgment of conviction

becomes final when the time for filing a petition expires.

A. The AEDPA's Text And Structure And This Court's Precedents Indicate That The Conviction Of A Defendant Who Has Not Petitioned For Certiorari Becomes "Final" When The Time To Petition Expires

1. As noted above, Section 2255 does not define the term "final." But "final" has a well-settled meaning in the law of collateral review, and that meaning informs the interpretation of when a judgment of conviction becomes "final" within the meaning of Section 2255, which governs motions for collateral review by federal prisoners. Under the retroactivity analysis of *Teague* v. *Lane*, 489 U.S. 288 (1989), judicial decisions announcing new rules of criminal procedure do not apply to cases in which the conviction becomes "final" before the new rules are announced. *Id.* at 310 (plurality opinion). This Court's precedents applying the *Teague* analysis establish that, in that context, a judgment not reviewed by this Court becomes "final" when "the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." *Caspari* v. *Bohlen*, 510 U.S. 383, 390 (1994). The same definition of finality was also long used by the Court in its collateral review cases before *Teague*. See, *e.g.*, *Griffith* v. *Kentucky*, 479 U.S. 314, 321 n.6 (1987) ("By 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied."); *United States* v. *Johnson*, 457 U.S. 537, 542 n.8 (1982) (same).

Although retroactivity principles have changed over time, the definition of when a case becomes final on direct review has been consistent over a series of this

Court's cases dating back more than 30 years before the enactment of the AEDPA. The finality definition in *Griffith* was used in *Linkletter* v. *Walker*, 381 U.S. 618, 622 n.5 (1965), and *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406, 409 n.3 (1966). According to the Court in *United States* v. *Johnson*, *Linkletter* and *Shott* indicated that "all newly declared constitutional rules of criminal procedure would apply retrospectively at least to judgments of conviction not yet final when the rule was established." 457 U.S. at 543. In *Johnson* v. *New Jersey*, 384 U.S. 719 (1966), and *Stovall* v. *Denno*, 388 U.S. 293 (1967), the Court departed from that rule and applied a balancing test regardless of finality. Later, *United States* v. *Johnson*, 457 U.S. at 562, reestablished the general principle that new rules apply to cases not yet final on direct review. But the definition of finality remained constant throughout that course of development.

The meaning that this Court has given the term "final" for purposes of determining whether new rules of criminal procedure apply retroactively on collateral review is highly relevant to the meaning of "final" in Section 2255 para. 6(1). The Court "presume[s] that Congress expects its statutes to be read in conformity with this Court's precedents." *United States* v. *Wells*, 519 U.S. 482, 495 (1997) (citing *North Star Steel Co.* v. *Thomas*, 515 U.S. 29, 34 (1995)). There is no indication in the AEDPA that Congress intended "final" to have a different meaning in Section 2255 para. 6(1) than the meaning this Court has accorded the term. On the contrary, because Section 2255, like the Court's cases defining finality, applies in the context of collateral review of criminal convictions, there is a particularly strong reason to presume that Congress intended "final" to have the same meaning in Section 2255 para.

6(1) as in those decisions. See *Porter* v. *Nussle*, 122 S. Ct. 983, 990 (2002) (construing the phrase "prison conditions" in a statute establishing exhaustion requirements for prison litigation to have the meaning this Court accorded the phrase in a similar context).

2. The conclusion that Congress intended in Section 2255 to adopt, and not silently to reject, this Court's definition of "final" in the collateral review context is confirmed by consideration of how "final" is used elsewhere in the AEDPA. Congress did define "final" in the AEDPA's parallel time-limit provision for state prisoners seeking collateral relief under 28 U.S.C. 2254. See 28 U.S.C. 2244(d)(1)(A).[4] The latter provision—which was enacted simultaneously with Section 2255 para. 6—fixes the date of "final" judgment as "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *Ibid.*

The courts of appeals have uniformly interpreted "direct review" in Section 2244(d)(1)(A) to encompass review of a state conviction by this Court.[5] Under that

[4] Section 2244(d)(1) provides:

> A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review * * *.

28 U.S.C. 2244(d)(1).

[5] See *Williams* v. *Artuz*, 237 F.3d 147, 151 (2d Cir.), cert. denied, 122 S. Ct. 279 (2001); *Kapral*, 166 F.3d at 575; *Hill* v. *Braxton*, 277 F.3d 701, 704 (4th Cir. 2002); *Ott* v. *Johnson*, 192 F.3d 510, 513 (5th Cir. 1999), cert. denied, 529 U.S. 1099 (2000); *Bronaugh* v. *Ohio*, 235 F.3d 280, 283 (6th Cir. 2000); *Anderson* v. *Litscher*, 281 F.3d 672, 674-675 (7th Cir. 2002); *Smith* v. *Bowersox*, 159 F.3d 345, 347-348 (8th Cir. 1998), cert. denied, 525 U.S. 1187 (1999); *Bowen* v. *Roe*, 188 F.3d 1157, 1159 (9th Cir. 1999); *Locke* v. *Saffle*, 237 F.3d 1269, 1273 (10th Cir. 2001); *Coates* v. *Byrd*, 211 F.3d 1225, 1226 (11th Cir. 2000), cert. denied, 531 U.S. 1166 (2001); see *Derman*, 298 F.3d at 40-41 (concluding without discussion that Section 2244(d)(1)(A) includes time for seeking certiorari in this Court). The D.C. Circuit has not yet addressed the issue.

interpretation, when a state prisoner does not petition this Court for certiorari following the affirmance of his conviction in the highest state court, the judgment becomes final when his time for seeking certiorari from this Court expires. That construction of Section 2244(d)(1)(A) is consistent with this Court's statement in a related context that "the process of direct review [of a state conviction], if a federal question is involved, includes the right to petition this Court for a writ of certiorari." *Barefoot* v. *Estelle*, 463 U.S. 880, 887 (1983); see *Bell* v. *Maryland*, 378 U.S. 226, 232 (1964) ("In the present case the [state court] judgment is not yet final, for it is on direct review in this Court.").

The definition of "final" set forth in Section 2244(d)(1)(A) informs the meaning of "final" in Section 2255 para. 6(1). The "normal rule of statutory construction" followed by this Court assumes that "identical words used in different parts of the same act are intended to have the same meaning." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 570 (1995) (quoting *Department of Revenue* v. *ACF Indus., Inc.*, 510 U.S. 332, 342 (1994)); accord *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 479 (1992). Thus, the definition of a term supplied in one part of a statute generally applies to the term when it appears in other parts of the statute. *Gustafson*, 513 U.S. at 570; *Sorenson* v. *Secretary of the Treasury*, 475 U.S. 851, 860 (1986).

That principle has particular force here because Section 2255 para. 6(1) and Section 2244(d)(1)(A) were enacted at the same time, are nearly identical in structure, and have a common purpose. Section 2255 para. 6(1) prescribes a limitation period for motions for collateral relief from federal convictions, while Section 2244 prescribes a limitation period for petitions for collateral relief from state convictions. Congress enacted both provisions as part of the AEDPA in an effort to impose more definite time limits on the filing of petitions for post-conviction relief. See *Kapral*, 166 F.3d at 571 & n.4; H.R. Conf. Rep. No. 518, 104th Cong., 2d Sess. 111 (1996). Under those circumstances, it is reasonable to conclude that Congress intended the definition of "final" set forth in Section 2244(d)(1)(A) also to apply to Section 2255 para. 6(1). See *Erlenbaugh* v. *United States*, 409 U.S. 239, 244 (1972) (rule of *in pari materia* "makes the most sense when the statutes were enacted by the same legislative body at the same time"); *Flanagan* v. *Johnson*, 154 F.3d 196, 200 n.2 (5th Cir. 1998) (the limitations provisions of Sections 2244 and 2255 should be construed *in pari materia* because of their identical purpose and similar language and structure).

3. In light of this Court's consistent articulation of a meaning for the word "final" in the collateral review setting and the presumption that Congress incorporated that definition in enacting the AEDPA, see pp. 16-18, *supra*, there is no reason to assume that dictionary definitions of "final" are helpful in interpretation of Section 2255. Nevertheless, the dictionary definition that fits most coherently with the language of Section 2255 recognizes finality only when the possibility of review by this Court elapses.

In some contexts, a judgment is deemed final when it resolves the entire controversy, even though the judgment still may be set aside on appeal. See *Webster's Third New International Dictionary* 851 (1993) (*Webster's*); *Black's Law Dictionary* 629 (6th ed. 1990) (*Black's*). Under that definition, a judgment of conviction is final when it is entered by the district court. See *Burch*, 202 F.3d at 1275. But that definition cannot apply under Section 2255, for it would require collateral review to begin before direct appeal is concluded.

In other contexts, a judgment may be deemed "final" if it is the last in time. See *Webster's* 851 (defining "final" as "last, terminating"); *Black's* 629 (defining "final" as "[l]ast"). But Congress's use of the phrase "becomes final" in Section 2255 would be untenably awkward for that definition of final. A court of appeals' judgment does not "become" the last in time; it simply is the last judgment, when no further review is sought.

The remaining definition is that a case becomes "final" when it is conclusive and not subject to further review. See *Webster's* 851 (defining "final" as "being a court finding that is conclusive as to jurisdiction and precluding the right to appeal to or continue the case in any other court upon the merits"); *Black's* 629 (defining "final decision or judgment" as "a decision from which no appeal or writ of error can be taken" and defining "final" as "conclusive; decisive; definitive; terminated; completed"). Under that definition, a judgment of conviction is final when there is no possibility of further direct review. There is nothing unnatural about applying that definition to Section 2255; and, because the alternative definitions do not fit, it supplies the best

contextual meaning for the word "final" as used in Section 2255.[6]

B. Defining "Final" As Not Subject To Further Direct Review Promotes Judicial Efficiency And Accords With The Purposes Of Section 2255

1. The view that a judgment of conviction does not become "final" until the time expires for seeking certiorari promotes the orderly administration of criminal justice. It is a well-established, longstanding rule that a district court may not ordinarily consider a Section 2255 motion while direct review is still pending. See *Kapral*, 166 F.3d at 572 (collecting authorities); 28 U.S.C. 2255 Rule 5 advisory committee's note (citing *Womack* v. *United States*, 395 F.2d 630, 631 (D.C. Cir. 1968)).[7] That

[6] To the extent that the legislative history of Section 2255 para. 6(1) sheds any light on the meaning of "final," it too supports the interpretation that a judgment of conviction does not become final until the time for seeking certiorari has expired. In the decade preceding enactment of the AEDPA, Congress considered several bills that would have added to Section 2255 limitation provisions very similar to the provision ultimately enacted. The bill that passed the House in 1995 proposed a two-year limitation period that began to run at "[t]he time at which the judgment of conviction becomes final." H.R. 729, 104th Cong., 1st Sess. § 105, at 8 (1995) (as passed by the House and received in the Senate). Although the text of the bill did not define the term "final," the Committee Report on the bill indicated that a judgment becomes final on "the conclusion of direct review of [*sic*] expiration of the time for seeking direct review." H.R. Rep. No. 23, 104th Cong., 1st Sess. 16 (1995). See S. 1763, 98th Cong., 1st Sess. § 6, at 7 (1983) (as reported by Senate Committee on the Judiciary) (using same language as H.R. 729); S. Rep. No. 226, 98th Cong., 1st Sess. 30 (1983) (Judiciary Committee Report on S. 1763) (indicating that judgment "becomes final" at "the time remedies on direct review are exhausted or the time for seeking direct review has expired").

[7] See also, *e.g.*, *United States* v. *Cook*, 997 F.2d 1312, 1319 (10th Cir. 1993); *United States* v. *Gordon*, 634 F.2d 638, 638 (1st Cir. 1980); *United States* v. *Davis*, 604 F.2d 474, 484-485 (7th Cir. 1979); *Jack* v. *United States*, 435 F.2d 317, 318 (9th Cir. 1970) (per curiam), cert. denied, 402 U.S. 933 (1971); *Welsh* v. *United States*, 404 F.2d 333, 333 (5th Cir. 1968) (per curiam); *Masters* v. *Eide*, 353 F.2d 517, 518 (8th Cir. 1965).

rule reflects the common sense judgment that it does not "further judicial efficiency or economy to encourage a collateral attack on a judgment of conviction that [is] subject to the possibility of" further direct review. *Burch*, 202 F.3d at 1276-1277. Parallel direct and collateral proceedings threaten to "delay[] the ultimate resolution of both direct and collateral review," *Kapral*, 166 F.3d at 572-573, and create the risk of inconsistent outcomes. Although this Court grants certiorari in only a small percentage of cases, commencing a collateral attack while direct review is ongoing is "wasteful and pointless" if the conviction is reversed by this Court. *Id.* at 572. Indeed, even if the outcome on direct review is not in the defendant's favor, it may "cause the defendant to limit or rethink the claims that would be raised on collateral review, or even dissuade the defendant from seeking collateral review." *Ibid.*

The interpretation adopted by the Fourth and Seventh Circuits will also lead at least some defendants to prepare their Section 2255 motions and petitions for certiorari simultaneously, or at least to spend some of the time before the certiorari deadline considering the option of proceeding directly to collateral review. See *Kapral*, 166 F.3d at 578 (Alito, J., concurring). As the Eleventh Circuit has noted, "the 90-day period for seeking certiorari should be available to defendants so that they may *consider* whether to seek certiorari, assess the merits of their application for discretionary review, and discuss these issues with their counsel."

Kaufmann v. *United States*, 282 F.3d 1336, 1338 (11th Cir. 2002).

It is also fair and efficient that the limitation period for commencing a collateral attack under Section 2255 not start to run until the law that will govern the defendant's entitlement to post-conviction relief is settled. That occurs when the defendant's conviction becomes "final" for *Teague* purposes, which, as explained above, is when the time for seeking certiorari expires. See p. 16, *supra*. "[I]n the interest of the orderly administration of direct and collateral proceedings, the first day of the one-year limitations period logically should be the last day on which any applicable new rule could be decided." *Kapral*, 166 F.3d at 572; see *Garcia*, 210 F.3d at 1060. "Beginning the limitations period three months earlier," as the Fourth and Seventh Circuits would do, "might encourage prisoners to file habeas petitions before they know of all the possible Constitutional challenges available to them." *Kapral*, 166 F.3d at 572; see *Garcia*, 210 F.3d at 1060. Then, in order to attempt to avail themselves of new rulings, the prisoners would file either amendments to their Section 2255 motions or successive motions. There is no reason to believe that Congress intended such an inefficient result.

2. Defining finality under Section 2255 to occur only when time expires for the prisoner to petition this Court for review also makes sense because it treats federal prisoners the same as similarly-situated state prisoners. As noted, Section 2244(d)(1) runs the limitation period from when the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been denied. There is no reason to believe that Congress intended to give federal prisoners less time to initiate post-conviction proceedings than prisoners convicted in state courts. *Kapral*, 166 F.3d at 575 (there is "no principled reason to treat state and federal habeas petitioners differently"); accord *Garcia*, 210 F.3d at 1060.

3. The conclusion that a judgment of conviction does not become "final" until the time expires for seeking certiorari also accords with Section 2255 para. 6's core purpose of limiting the time for commencing a collateral attack. Although that construction of the limitation period gives prisoners who do not seek certiorari somewhat more time to commence a collateral attack than the interpretation adopted by the Fourth and Seventh Circuits, the difference is slight. A court of appeals normally issues its mandate 21 days after it enters judgment, so the difference between the two interpretations is only 69 days.[8] Because "the collateral review process will [not] be slowed in any meaningful way" even under the approach that allows defendants time "to consult with counsel and to consider whether it would be appropriate to exercise their right to seek certiorari," *Kapral*, 166 F.3d at 573, the choice between the two interpretations does not implicate "the congressional objective of imposing time limits where none previously existed," *id.* at 571.

Indeed, as the Eleventh Circuit has noted, the interpretation that treats a conviction as final when the court of appeals issues its mandate "create[s] a strong incentive for prisoners to file plainly frivolous petitions for certiorari for the sole purpose of extending their

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[8] Ordinarily, the mandate issues seven days after the denial of a petition for rehearing or the expiration of the time for seeking rehearing, see Fed. R. App. P. 41(b), which is typically 14 days after the entry of judgment, see Fed. R. App. P. 40 (a), but which may be lengthened by motion or by local rule in some circuits, see, *e.g.*, 11th Cir. R. 35-2.

time for habeas review." *Kaufmann*, 282 F.3d at 1338. The 69-day difference would disappear if defendants routinely filed petitions for writs of certiorari in order to prolong the time for initiating a collateral attack. Particularly in light of that likely consequence, interpreting "final" to encompass the time for seeking certiorari fully advances the AEDPA's purpose of limiting the time in which a federal prisoner may petition for post-conviction review.

C. Treating A Judgment Of Conviction As "Final" When The Court Of Appeals Issues Its Mandate Is Not Justified By The *Expressio Unius* Maxim

1. In holding that a judgment of conviction becomes "final" for purposes of Section 2255 para. 6(1) when the court of appeals issues its mandate, the Fourth and Seventh Circuits relied heavily on the *expressio unius est exclusio alterius* principle—that "expressing one item of [an] associated group or series excludes another left unmentioned," *United States* v. *Vonn*, 122 S. Ct. 1043, 1049 (2002). Those courts drew a negative implication from Congress's failure to include in Section 2255 the definition of "final" that Congress included in Section 2244(d)(1)(A). But the *expressio unius* maxim does not support the construction of Section 2255 para. 6(1) adopted by those courts, and the maxim is inapplicable here in any event.

Faced with the absence of a definition of "final" in Section 2255, the Seventh Circuit in *Gendron* compared the language of Sections 2244 and 2255 and concluded by negative implication that some other definition of finality must apply to Section 2255. See *Gendron*, 154 F.3d at 674 (citing *Russello* v. *United States*, 464 U.S. 16, 23 (1983)). The *Gendron* court reasoned:

> As stated above, the period of limitations for § 2255 runs from "the date on which the judgment of conviction becomes final." 28 U.S.C. § 2255. In comparison, the period of limitations for petitions filed under § 2254 begins to run from "the date on which the judgment became final by the conclusion of direct review *or the expiration of time for seeking such review*[.]" 28 U.S.C. § 2244(d)(1)(A) (emphasis added). Thus, in drafting § 2244, Congress explicitly included the time for seeking leave to appeal with a state supreme court even if the petitioner elected not to do so. Such additional language is lacking in § 2255.

Id. at 674. As the court's placement of the emphasis suggests, the court read Section 2255 as if it referred to the date on which the conviction becomes "final by the conclusion of direct review." *Ibid.* The court therefore contrasted Section 2255 with Section 2244 on the ground that only Section 2244 contains the "additional language" referring to "the expiration of the time for seeking such review." From that premise, the court held that the "expiration" language, which is included in Section 2244's definition of finality but is not included in Section 2255's definition, does not apply to Section 2255 cases. Like the *Gendron* court, the Fourth Circuit also drew a negative implication from the absence of Section 2244's clarifying language in Section 2255, and it therefore also concluded that "final" means something different in Section 2255 than it means in Section 2244. See *Torres*, 211 F.3d at 839-840.

The textual premise upon which the reasoning of *Gendron* and *Torres* rests is, however, incorrect. Section 2255 does *not* define the term "final" as the date on which the conviction becomes final "by the con-

clusion of direct review." Rather, it does not define the term "final" at all. Thus, there is no basis for concluding that Congress intended a definition of "final" in Section 2255 that excludes a particular part of the definition of "final" set forth in Section 2244. See *Garcia*, 210 F.3d at 1060; *Burch*, 202 F.3d at 1278. Although the inclusion of only one part of the Section 2244(d)(1)(A) definition in Section 2255 might imply the intentional exclusion of the other, the omission of both portions does not. Cf. *Duncan* v. *Walker*, 533 U.S. 167, 171-173 (2001) (inclusion of "State" but not "Federal" in one provision, when other related provisions include the terms "State" and "Federal," implies intentional exclusion of "Federal" in first provision).

Rather, if the *expressio unius* principle were applied to Sections 2244(d)(1)(A) and 2255, it would lead to the conclusion that *neither* portion of the definition of "final" set forth in Section 2244(d)(1)(A) applies to Section 2255. Under that interpretation of Section 2255, a federal prisoner's judgment of conviction would become "final" without regard to direct review—*i.e.*, when the district court enters the judgment. See *Burch*, 202 F.3d at 1278; p. 21, *supra*; cf. 18 U.S.C. 3562(b) ("Notwithstanding the fact that a sentence of probation can subsequently be [modified, revoked or corrected,] a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes."). No court has adopted that construction of Section 2255. That is not surprising because the construction would lead to the absurd result that many federal defendants would have to seek post-conviction relief long before the conclusion of their direct appeals.

This Court has long counseled against the uncritical reliance on the *expressio unius* maxim reflected in the Fourth and Seventh Circuits' analysis. See, *e.g.*, *Ford*

v. *United States*, 273 U.S. 593, 612 (1927) (noting that the maxim is "a valuable servant, but a dangerous master" and should not be applied when it "leads to inconsistency or injustice"). The Court has not hesitated to conclude that "*[e]xpressio unius* just fails to work" in situations like this one, where the language of the statute and the context indicate that the maxim should not apply, or where it would produce nonsensical results. *Chevron U.S.A. Inc.* v. *Echazabal*, 122 S. Ct. 2045, 2051 (2002); see *Burns* v. *United States*, 501 U.S. 129, 136 (1991) ("An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent.").

The definition of "final" in Section 2244(d)(1)(A) accords with the structure and purpose of the AEDPA, including Section 2255 para. 6(1), and comports with the well-settled definition used by this Court in its retroactivity jurisprudence. There is no plausible reason why Congress would have chosen a different definition of "finality" to apply to federal prisoners under Section 2255 than to state prisoners under Section 2244. And the definition that the Fourth and Seventh Circuits have attributed to Congress would constitute a sharp break from the practice of rarely, if ever, allowing the commencement of collateral attacks while direct review is still pending. In view of those considerations, the failure of Congress to reiterate in Section 2255 the definition of final that it included in Section 2244 cannot support the conclusion that Congress intended a different definition to apply to Section 2255.

The more natural and more sensible inference is that Congress expected that the definition of "final" in Section 2244 would apply to that term when used later

in the statute. See pp. 19-20, *supra*; *e.g.*, *Sorenson*, 475 U.S. at 860; *Erlenbaugh*, 409 U.S. at 243. "As one court has aptly put it, '[n]ot every silence is pregnant.'" *Burns*, 501 U.S. at 136 (quoting *Illinois Dep't of Pub. Aid* v. *Schweiker*, 707 F.2d 273, 277 (7th Cir. 1983)). Congress's failure to include the definition in Section 2255 likely signified "merely an expectation that nothing more need[ed to] be said in order to effectuate [its] legislative objective." *Ibid.*[9]

2. The Fourth Circuit in *Torres* also found support for its interpretation in the contrasting language of Section 2255 and 28 U.S.C. 2263. Section 2263 governs habeas petitions filed by state prisoners serving capital sentences in States that qualify for expedited collateral review procedures. It provides that habeas petitions must be filed "not later than 180 days after final State court affirmance of the conviction and sentence on direct review or the expiration of the time for seeking such review." 28 U.S.C. 2263(a). The Fourth Circuit thought it "significant that Congress did not choose, as it did in § 2263, to use language in § 2255 that affirmatively expands the period of time before the start of the limitation period for filing a § 2255 motion." 211 F.3d at 840. By negative implication, the court concluded that Congress did not intend the commencement of the limitation period under Section 2255 to wait until the time for seeking further direct review expires. *Ibid.*

[9] It is also possible that the omission of the clarifying material from Section 2255 para. 6(1) was "the result of inadvertence or accident." *Ford*, 273 U.S. at 612. As this Court has noted, "in a world of silk purses and pigs' ears, the [AEDPA] is not a silk purse of the art of statutory drafting." *Lindh* v. *Murphy*, 521 U.S. 320, 336 (1997). Indeed, the Tenth Circuit has noted that the legislative record surrounding the adoption of the limitation provisions suggests that the "hypothesis of careful draftsmanship" upon which the *expressio unius* principle is premised may well be inapplicable here. *Burch*, 202 F.3d at 1277 (quoting *Kapral*, 166 F.3d at 579 (Alito, J., concurring)).

That application of the *expressio unius* maxim is even more flawed than its application in the context of Section 2244(d)(1)(A). To begin with, there is essentially the same problem as in the Section 2244(d)(1)(A) context. Section 2255 para. 6(1) refers to *neither* of the two events that Section 2263 identifies as possible starting points for the limitation period—"affirmance of the conviction on direct review" and "the expiration of the time for seeking such review." Thus, reasoning by negative implication from Section 2263 does not justify the conclusion that the limitation period in Section 2255 para. 6(1) begins to run at one of those times rather than the other. See pp. 27-28, *supra*.

In addition, there is a problem that is not present in the context of Section 2244(d)(1)(A). Section 2263 is quite different in language and structure from Section 2255 para. 6(1). Most notably, Section 2263 ties the applicable period of limitation to "affirmance" of the conviction, while Section 2255 para. 6(1) ties the limitation period to when the conviction "becomes final." See *Torres*, 211 F.3d at 845 (Hamilton, S.J., dissenting) (citing *Kapral*, 166 F.3d at 576). It is thus particularly inappropriate to draw negative inferences from Section 2263 about the meaning of that critical phrase in Section 2255 para. 6(1). See *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 122 S. Ct. 2226, 2234 (2002) ("The *Russello* presumption—that the presence of a phrase in one provision and its absence in another reveals Congress' design—grows weaker with each difference in the formulation of the provisions under inspection.").

To the extent that Section 2263 sheds any light on the meaning of Section 2255 para. 6(1), it supports the interpretation endorsed by the majority of the courts of appeals, not the interpretation adopted by the Fourth and Seventh Circuits. The existence of Section 2263, with its expedited limitation period linked to the conclusion of state court review, may explain why Congress felt it necessary to be particularly clear about when the limitation period in Section 2244(d)(1)(A) begins to run. Section 2244(d)(1)(A), like Section 2263, applies to state prisoners. Congress may therefore have been concerned that, absent clarifying language in Section 2244(d)(1)(A), courts would assume that the limitation period in that section begins at the same time as the limitation period in Section 2263. Congress would, however, have seen no need for clarifying language in Section 2255. Unlike Section 2263, Section 2255 applies to federal prisoners. Furthermore, as discussed above, because of the parallel language and structure of Section 2255 para. 6(1) and Section 2244(d)(1)(A), Congress could expect the courts to apply under Section 2255 para. 6(1) the same definition of "final" that Congress provided in Section 2244(d)(1)(A).

D. Petitioner's Motion Under Section 2255 Was Timely

In sum, consistent with the text and structure of AEDPA, the background definition of finality long approved by this Court, and the orderly administration of post-conviction review, a federal judgment of conviction becomes "final" for purposes of Section 2255 para. 6(1) only when the possibility of further direct review is exhausted. Thus, because petitioner did not file a petition for a writ of certiorari on direct appeal, his judgment of conviction became final when the time

within which he could file a petition expired. That occurred on February 22, 1999—90 days after the court of appeals affirmed his convictions. See Sup. Ct. R. 13.1. Petitioner filed his initial Section 2255 motion on February 22, 2000—exactly one year after his judgment of conviction became final. Therefore, contrary to the decision of the court of appeals, petitioner's initial Section 2255 motion was timely filed.[10]

Further proceedings in the court of appeals are warranted, however, to determine whether that court should nonetheless affirm the district court's judgment denying petitioner's Section 2255 motion. As the court of appeals noted in its opinion, Pet. App. 3a, and the government advised this Court in its brief in opposition, Br. in Opp. 11, petitioner failed to address the underlying claims on which the district court had granted him a certificate of appealability in any of his briefs in the court of appeals. Petitioner therefore abandoned those claims and is not entitled to Section 2255 relief. See Br. in Opp. 11-12; Fed. R. App. P. 28(a)(9); *Hojnacki* v. *Klein-Acosta*, 285 F.3d 544, 549 (7th Cir. 2002).

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[10] In contrast, petitioner's motion to amend and proposed amendment to the Section 2255 motion were not timely filed. They were submitted on May 4, 2000, well after the one-year limitation period had run. Further, they assert claims that do not arise out of the same "conduct, transaction, or occurrence" as the initial claims and therefore do not relate back to the initial motion under Rule 15(c) of the Federal Rules of Civil Procedure. Petitioner has not challenged that conclusion before this Court.

CONCLUSION

The judgment of the court of appeals should be vacated and the case should be remanded to that court for further proceedings.

Respectfully submitted.

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SEPTEMBER 2002

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IN THE

Supreme Court of the United States

ERICK CORNELL CLAY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States of Appeals for the Seventh Circuit

BRIEF FOR *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW

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No. 01-1500

IN THE

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Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW[1]

STATEMENT OF THE CASE

In 1997, a jury in the United States District Court for the Northern District of Indiana convicted petitioner of arson and distribution of cocaine. *See* Pet. App. 2a. The district court sentenced petitioner to 137 months in prison and three years of supervised release. *See id.* The Seventh Circuit affirmed the conviction and sentence on November 23, 1998, and, in the

[1] *Amicus curiae* was appointed by the Court on July 29, 2002, to brief and argue this case in support of the judgment below. *See* 71 U.S.L.W. 3115 (2002). This brief was wholly authored by *amicus curiae*, and no person or entity other than JENNER & BLOCK, LLC made a monetary contribution to the preparation or submission of the brief.

absence of any petition for rehearing, issued its mandate on December 15, 1998. *See id.*

Petitioner did not file a petition for a writ of certiorari. Accordingly, under the Seventh Circuit's decision in *Gendron v. United States*, 154 F.3d 672 (7th Cir. 1998) (per curiam), *cert. denied*, 526 U.S. 1113 (1999), the issuance of the mandate triggered the start of the one-year period in which petitioner could permissibly file a motion pursuant to 28 U.S.C. § 2255, which begins running on "the date on which the judgment of conviction becomes final." 28 U.S.C. § 2255 para. 6(1); *see Gendron*, 154 F.3d at 674 (stating that "federal prisoners who decide not to seek certiorari with the Supreme Court will have the period of limitations begin to run on the date this court issues the mandate in their direct criminal appeal").

Contrary to the Seventh Circuit's clearly established rule, petitioner filed a § 2255 motion on February 22, 2000, one year and sixty-nine days after the mandate issued. The government opposed the motion solely on the ground that it was "completely meritless," *see* Gov't Resp. to 2255 Motion to Vacate, Set Aside, or Correct Sentence, at 1 (N.D. Ind. filed Apr. 24, 2000), but the district court directed the parties to "show cause why [petitioner's § 2255] petition should not be dismissed as untimely," and ultimately dismissed the motion on that ground. Pet. App. 5a, 7a-9a. The court also refused to excuse the late filing under the doctrine of equitable tolling (which petitioner had not raised). *See id.*

The Court of Appeals affirmed. The court pointed out that it had previously instructed petitioner to address the merits of certain claims in his brief, and that he had failed to follow this instruction, addressing only the issue of the timeliness of his motion. Pet. App. 1a-6a. Nevertheless, the court determined that the timeliness issue was "dispositive of the case." *Id.* The court acknowledged that the Circuits had split on the issue, but

declined to revisit its holding in *Gendron*. Therefore, because petitioner had filed his § 2255 motion "sixty-nine days too late," the court found that "the district court was correct when it denied the motion." *Id.* at 6a.

SUMMARY OF ARGUMENT

Congress established that, except in circumstances not applicable here, a motion under 28 U.S.C. § 2255 must be brought within one year of "the date on which the judgment of conviction *becomes final*." 28 U.S.C. § 2255 para. 6(1) (emphasis added). Congress did *not* include in § 2255 a clause it included in an analogous statute of limitations enacted at the same time, governing petitions for habeas corpus relief under 28 U.S.C. § 2254. Congress required that petitions under § 2254 generally must be brought within one year from "the date on which the judgment became final *by the conclusion of direct review or the expiration of the time for seeking such review*." 28 U.S.C. § 2244(d)(1)(A) (emphasis added).

A. Basic principles of statutory interpretation dictate that, when Congress simultaneously enacts two markedly similar provisions, but then chooses significantly *different* language to govern one aspect of those provisions, Congress intended that difference for a reason. The natural interpretation of the language of the statute is that, whereas the limitation period in § 2244 begins to run only after "the conclusion of direct review or the expiration of the time for seeking such review," the limitation period in § 2255 is *not* dependent upon the expiration of the time for review – which, indeed, is the *ordinary* rule; in most contexts and for most purposes, the finality of a judgment is *not* dependent on the expiration of the time for review. This is the conclusion reached by the Courts of Appeals for the Seventh and Fourth Circuits and by several district courts – and, indeed, this is the position previously advocated on appeal by the United States, *see Kapral v. United States*, 166 F.3d 565,

569 (3d Cir. 1999). Thus, petitioner's judgment of conviction in this case became final when the Court of Appeals issued its mandate, the last judicial act in connection with petitioner's direct appeal.

Because Congress used very different language to define two otherwise analogous (and virtually identical) limitation provisions in § 2244 and § 2255, the proper canon of construction that must be applied in this case is set forth in *Russello v. United States*, 464 U.S. 16 (1983): "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Id.* at 23 (citation and internal quotation marks omitted). This canon is deeply entrenched in this Court's precedents, and has been applied in a wide variety of statutory contexts – including, on two previous occasions, the very statute at issue in this case. *See Duncan v. Walker*, 533 U.S. 167 (2001); *Hohn v. United States*, 524 U.S. 236 (1998). Any other reading of § 2255 and § 2244 is impossible, because it would render superfluous much of the language in § 2244.

The parties struggle to identify a different (and more favorable) canon of construction, and to distinguish *Russello*, but without success. The parties inexplicably invoke the principle that *identical words* used in different parts of the same statute are intended to have the same meaning, but the simple answer is that Congress quite clearly did *not* use "identical words" in § 2244 and § 2255. The government also directs its fire at the *expressio unius est exclusio alterius* principle, but that is not the canon at issue here.

Principally, the parties place great reliance on a claim that application of the *Russello* principle here proves too much, because the words "the conclusion of direct review" also appear

in § 2244 but not in § 2255. But it would have made no sense for Congress to have written the statute to say that the limitation period in § 2244 runs from "the date on which the judgment became final or the expiration of the time for seeking direct review." Instead, § 2244 sets up a comparison of finality triggers, and this requires the two alternate triggers ("the conclusion of direct review" and "the expiration of the time for seeking such review") to be placed side by side and held up for examination.

B. The application of the *Russello* principle in this case is strongly enforced by the fact that the ordinary and established meaning of when a judgment "becomes final" does *not* include the expiration of time for review. Rather, and particularly with regard to the commencement of statutes of limitation and other time bars, it is broadly established that a judgment "becomes final" when the Court of Appeals issues its mandate in connection with the direct appeal as of right, without regard to the possibility of further discretionary proceedings, unless a stay of the mandate is obtained. This is the established rule under the former version of Federal Rule of Criminal Procedure 33 (which, significantly, Congress considered as a model with respect to an early formulation of the § 2255 time limitation), the Speedy Trial Act (which uses the identical "becomes final" language), and other limitation statutes. This Court may presume that Congress was familiar with this settled law. *See Holloway v. United States*, 526 U.S. 1, 9 (1999); *Cannon v. University of Chicago*, 441 U.S. 677, 696-98 (1979); *United States v. Merriam*, 263 U.S. 179, 186 (1923).

Indeed, the rule that a judgment becomes final upon the issuance of the mandate of the Court of Appeals, without regard to the expiration of the time to file a petition for certiorari, is also consistent with the ordinary operation of judgments. Judgments of all kinds of all courts, trial and appellate, become "final" without regard to the expiration of

the time for review. The determination of the Court of Appeals in this case is unremarkable: the court simply concluded that petitioner's conviction became "final" when the Court of Appeals issued its mandate, the last act on petitioner's direct appeal. Although it is established that the finality of an "otherwise final" judgment may be suspended by certain post-judgment filings, and that a statute of limitations often is arrested or tolled upon such a post-judgment filing or appeal, in this case the petitioner did *nothing* to arrest the finality of the judgment of the Court of Appeals. Ultimately, the view that, without any further definition in the statute, the judgment of a court does not "become final" until the time expires for *review* of that judgment undermines the integrity of a judgment of a court of law.

C. The parties place great reliance on the definition of "final" this Court has used "for purposes of retroactivity analysis" in cases such as *Griffith v. Kentucky*, 479 U.S. 314 (1987), and *Teague v. Lane*, 489 U.S. 288 (1989); *see Caspari v. Bohlen*, 510 U.S. 383, 390 (1994). But this Court has made clear that the non-statutory definition of "finality" used in these cases derives from "basic norms of constitutional adjudication." *Griffith*, 479 U.S. at 322. The Court determined that it was precluded from "fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule." *Id.* at 323 (internal quotation marks omitted). These considerations have no applicability here. Moreover, whereas Congress's formulation in § 2244 is analogous to that in the *Griffith/Teague* cases, the formulation in § 2255 markedly is *not*.

Finally, the remaining arguments of incongruity and impracticality asserted by the parties with respect to the statutory interpretation of the Court of Appeals simply are

inapposite. Because the difference in the language of the statutory text is material and plain, it is not necessary for this Court to divine and find sufficient a reason for what Congress has done. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 122 S. Ct. 708, 717 (2002); *Mansell v. Mansell*, 490 U.S. 581, 594 (1989). But there nevertheless *are* reasons why Congress would treat claims under § 2254 (to which § 2244 relates) and § 2255 differently, given fundamental differences in the nature of the proceedings under § 2254 and § 2255. Moreover, under the court's interpretation of § 2255 here, defendants still have adequate time to prepare claims under § 2255 (and far more than the six months permitted for claims under § 2254 in certain *capital* cases under 28 U.S.C. § 2263); the issue in this case is whether a defendant who does not petition for certiorari will have one year after the Court of Appeals issues its mandate (and almost 10 months after the time to file a petition for certiorari expires), or *one year and sixty-nine days* after the Court of Appeals issues its mandate. And it is simply false that the interpretation of the court below will encourage the filing of additional and unnecessary petitions for certiorari. The risk of frivolous filings comes from the practice – not at issue here, and contrary to the established interpretation of analogous provisions of Rule 33 and the Speedy Trial Act – that the time bar in § 2255 is automatically extended if a defendant files a petition for certiorari.

In sum, the *Russello* principle clearly and appropriately governs this case. The decision of the Court of Appeals is consistent with the normal operation of judgments and should be affirmed.

ARGUMENT

I. A COMPARISON OF THE LANGUAGE OF 28 U.S.C. § 2255 AND 28 U.S.C. § 2244 ESTABLISHES THAT CONGRESS DID NOT INTEND THE WORDS "BECOMES FINAL" IN § 2255 TO BE DEPENDENT ON THE EXPIRATION OF THE TIME FOR REVIEW.

As this Court repeatedly has declared, "[l]ogic and precedent dictate that [the] starting point in every case involving construction of a statute is the language itself." *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978) (citations and internal quotation marks omitted); *accord Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). This Court's obligation is to construe § 2255 as it is written, not as the parties would have the Court amend it. Here, in order to determine the meaning of the term "final" in the § 2255 limitation period, the language of § 2255 must be compared to other provisions in the Antiterrorism and Effective Death Penalty Act ("AEDPA"). *See Duncan v. Walker*, 533 U.S. 167, 172-73 (2001); *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (making clear the importance of considering a statute in the context of the whole "statutory scheme"). In particular, it is important to consider the differences between § 2255, which sets forth a limitation period for collateral review motions of federal prisoners, and § 2244, which sets forth a limitation period for analogous habeas corpus petitions of state prisoners pursuant to § 2254.

Section 2244 contains language that, if transplanted into § 2255, would clearly give federal prisoners who fail to file petitions for certiorari the extra sixty-nine days on which the

parties here insist.[2] However, § 2255 pointedly does not contain that language, and Congress's choice to include it in one provision and exclude it in the other must be presumed to be purposeful and significant. As the Courts of Appeals for the Seventh and Fourth Circuits and several district courts have held, *see Gendron*, 154 F.3d at 674; *United States v. Torres*, 211 F.3d 836, 838-41 (4th Cir. 2000); *see also, e.g.*, *United States v. Burch*, 37 F. Supp. 2d 1249, 1253 (D. Kan. 1998) (collecting cases), *rev'd*, 202 F.3d 1274 (10th Cir. 2000) – and, indeed, as the United States previously argued, *see Kapral v. United States*, 166 F.3d 565, 569 (3d Cir. 1999) – the necessary inference is that Congress did *not* intend that § 2255 have the same meaning as § 2244. Comparison of § 2255 and § 2263, which governs the habeas petitions of prisoners serving capital sentences in certain states and which contains language similar to § 2244, is similarly instructive.

1. For the most part, § 2244's one-year limitation period closely parallels the period set forth in § 2255. Each provision describes four possible dates and provides that the limitation period shall run from the latest of those dates. The provisions' descriptions of three of those four dates – relating to governmental impediments to filing, newly recognized constitutional rights, and newly discovered facts – are virtually identical, although there are a few appropriate differences in wording to reflect the fact that § 2244 relates only to state prisoners. *Compare* 28 U.S.C. § 2255 para. 6(2)-(4) *with id.*

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[2] Under § 2255, a defendant who does not file a petition for certiorari either will have one year from the date the Court of Appeals issues its mandate to bring a § 2255 motion (under the construction of the Fourth and Seventh Circuits), or one year and sixty-nine days from the date the court issues its mandate (under the construction of the other Circuits). *See* Gov't Br. at 25 (recognizing that "the difference is slight," normally involving only sixty-nine days).

§ 2244(d)(1)(B)-(D). But, although both sections refer to finality of judgment as the marker for the fourth date, they do so in strikingly different ways. Section 2255 states that "[t]he limitation period shall run from . . . the date on which the judgment of conviction becomes final," *id.* § 2255 para. 6(1), whereas § 2244 states that "[t]he limitation period shall run from . . . the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review," *id.* § 2244(d)(1)(A).

Because Congress did not otherwise define "final" and because it used different "final"-related language in § 2244 and § 2255, the proper canon of construction in this case is plainly not one that tries to harmonize the use of a single statutory term or phrase in a number of different contexts. Rather, the canon that must be applied is set forth in *Russello v. United States*, 464 U.S. 16 (1983): "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Id.* at 23 (internal quotation marks and citation omitted). This canon is deeply entrenched in this Court's precedents, and has been applied in a wide variety of statutory contexts, including AEDPA. *See, e.g.*, *Barnhart*, 534 U.S. at 452-53; *Beach v. Ocwen Fed. Bank*, 523 U.S. 410 (1998); *Bates v. United States*, 522 U.S. 23, 29 (1997); *United States v. Gonzales*, 520 U.S. 1, 5 (1997); *Brown v. Gardner*, 513 U.S. 115, 120 (1994); *General Motors Corp. v. United States*, 496 U.S. 530, 538 (1990); *INS v. Cardoza-Fonesca*, 480 U.S. 421, 432 (1987).

In this case, Congress chose to include the phrase "the expiration of the time for seeking [direct] review" in § 2244, and thus to lengthen the limitation period for state prisoners who did not seek such review, but chose not to include similar language in § 2255. Under *Russello*, "[t]he absence of [the

§ 2244] language in § 2255 provides a powerful negative inference that the start of its one-year period of limitation is not delayed until the expiration of the period in which a federal defendant could have petitioned for certiorari, but did not." *Torres*, 211 F.3d at 839-40; *see also Gendron*, 154 F.3d at 674 ("In § 2244, Congress expressly included the period for seeking review whether or not a petitioner elected to avail himself of the opportunity. Because similar language is absent in § 2255, we conclude that Congress intended to treat the period of limitations differently under the two sections."). *See generally, e.g.*, *General Motors Corp.*, 496 U.S. at 538 ("Since the statutory language does not expressly impose a 4-month deadline and Congress expressly included other deadlines in the statute, it seems likely that Congress acted intentionally in omitting the 4-month deadline in § 110(a)(3)(A) [of the Clean Air Act].").

Any other reading of the two provisions is impossible, because it renders superfluous much of the language describing the § 2244 limitation. If "final" as used in AEDPA necessarily included the expiration of time for seeking further review, then there would have been no need for Congress to include the extra language that appears in § 2244(d)(1)(A). *See Hohn v. United States*, 524 U.S. 236, 249 (1998) ("We are reluctant to adopt a construction making another statutory provision superfluous."); *see also Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955). Petitioner's contention that this language is included because different states themselves have different definitions of finality, *see* Pet. Br. at 22, cannot be accurate: only federal courts entertain § 2254 petitions, and the question that must be answered by both § 2244 and § 2255 is what "final" means as a matter of federal law. *See, e.g.*, *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 111-12 (1983) (explaining that "[w]hether one has been 'convicted' within the language of the

gun control statutes is necessarily . . . a question of federal, not state, law, despite the fact that the predicate offense and its punishment are defined by the law of the State"); *United States v. Turley*, 352 U.S. 407, 411 (1957). Federal courts are just as able to divine a uniform federal meaning of "final" for application to state prisoners (and then to apply it to the different kinds of proceedings that result from the varying laws of different states) as they are able to divine the meaning of "final" in § 2255.

In short, because of the difference in wording between § 2255 and the otherwise almost identical § 2244, the two statutory sections must mean different things. While that conclusion does not yet determine affirmatively what "final" means in § 2255, it does definitively rule out the specific meaning advocated by the parties. But unless the parties are correct, petitioner's motion, filed on the last possible day under the most generous possible interpretation of the statute, was plainly untimely. Moreover, as shown below in Part II, the most natural reading of "final" in § 2255 is that it does *not* refer to the time for seeking further review when that review is not actually sought.

2. Faced with these powerful textual arguments, the parties struggle to identify a different (and more favorable) canon of construction, and to distinguish *Russello* away. First, the parties claim that § 2244 essentially defines the term "final" as used in § 2255. Second, the parties assert that *Russello* does not apply to AEDPA provisions, and more specifically that it cannot be used in comparing § 2244 and § 2255 because at least part of § 2244 must necessarily be read into § 2255's limitation period. Third, the parties argue that the language of § 2263 undermines the comparison between § 2244 and § 2255. These arguments must be rejected.

a. *Section 2244 does not provide the meaning of "final" in § 2255.* In reading the "final[ity]" provisions of § 2255 and § 2244 side by side, the parties inexplicably invoke the principle that "identical words used in different parts of the same act are intended to have the same meaning." *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986) (discussing two uses of word "overpayment" in one statutory provision); *see* Pet. Br. at 20; Gov't Br. at 19. But this principle of statutory interpretation simply has no relevance here. As the Fourth and Seventh Circuits correctly recognized, Congress quite clearly did not use "identical words" in § 2244 and § 2255, even though both sections have the same purpose of imposing a limitation period on a formerly limit-less collateral review process. Section 2255 refers to the moment when a federal prisoner's conviction "becomes final," and elaborates no further; § 2244, in contrast, sets forth two specific circumstances in which a state prisoner's conviction will be considered to have become final for habeas purposes.

Nor does § 2244, as the parties intimate, provide a complete definition of "final" for use in all of the AEDPA provisions that follow it. Section 2244 could have easily been written in a definitional manner – it could have said, for instance, that the one-year limitation period runs from the date when "the judgment became final, which is defined in this chapter as the date at the conclusion of direct review or the expiration of the time for seeking such review." But "[t]he short answer is that Congress did not write the statute that way." *United States v. Naftalin*, 441 U.S. 768, 773 (1979). Rather, Congress wrote § 2244 to suggest nothing more than that two particular events are relevant for the specific purpose of fixing the limitation period for the federal habeas applications of state prisoners. *See* 28 U.S.C. § 2244(d)(1)(A) (stating that the triggering date is the latest of the date "on which the judgment became final *by* the conclusion of direct

review or the expiration of the time for seeking such review" (emphasis added)); *see also City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981).

b. *Russello is fully applicable here.* Both petitioner and the United States attempt to distinguish away or otherwise attack the *Russello* principle, but none of their various efforts in this regard is successful. As an initial matter, it must be noted that the *Russello* canon is distinct from the related principle of *expressio unius est exclusio alterius*, at which the government directs its fire. *See* Gov't Br. at 26, 28-29. The *expressio unius* principle is that "expressing one item of [an] associated group or series excludes another left unmentioned," *United States v. Vonn*, 122 S. Ct. 1043, 1049 (2002), and "depends on identifying a series of two or more terms or things that should be understood to go hand in hand, which are abridged in circumstances supporting a sensible inference that the term left out must have been meant to be excluded." *Chevron U.S.A. Inc. v. Echazabal*, 122 S. Ct. 2045, 2050 (2002); *see, e.g., Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993); *Ford v. United States*, 273 U.S. 593, 611 (1927). But *expressio unius* applies where it is unclear whether the drafter even considered the existence or the relevance of the excluded term, which the drafter by definition did not use; the *Russello* principle applies where the drafter *did* choose to use in one place, and therefore necessarily must have known about and thought about, the word or item excluded in another place. The *Russello* principle therefore obviously creates a stronger presumption, and thus a stronger canon of interpretation, than *expressio unius*.

In this case, there is no reason to believe that the *Russello* principle is inapposite based on the so-called "hypothesis of careful draftsmanship." Pet. Br. at 22-23 (quoting *United States v. Burch*, 202 F.3d 1274, 1277 (10th Cir. 2000) (citing

Kapral v. United States, 166 F.3d 565, 579 (3d Cir. 1999) (Alito, J., concurring)). The *Russello* decision itself and the many other decisions of this Court that have relied on the same basic canon of statutory construction do not depend on the existence of some proof that Congress labored particularly carefully over the statutory provisions at issue; rather, they embody a basic and generally applicable presumption that Congress does act carefully and thoughtfully when it drafts statutes. The *Russello* Court compared a section of RICO that spoke broadly of "any interest . . . acquired" with the immediately following section, which more narrowly covered "any interest in . . . any enterprise which [the defendant] has established[,] operated, controlled, conducted, or participated in the conduct of." *Russello*, 464 U.S. at 23 (internal quotation marks and citation omitted). The Court "refrain[ed] from concluding . . . that the differing language in the two subsections has the same meaning in each," stating that it "would not presume to ascribe this difference to a simple mistake in draftsmanship." *Id.*; *see also, e.g., Barnhart*, 534 U.S. at 454.

Similarly, the difference between § 2255 and § 2244, which are closely related provisions, is far too striking to ascribe to a mere drafting mistake. Indeed, the *Russello* principle applies with particular force where, as here, the two provisions to be compared were enacted at the same time as part of the same statute, and where the relevant language in the provision from which the negative implication is drawn was added after the provision being interpreted had already come into existence.[3] As this Court has explained, "negative

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[3] As petitioner explains, when the first proposed trigger for the § 2244 statute of limitations was changed in S. 623 from "the date on which State remedies are exhausted" to "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking

implications raised by disparate provisions are strongest when the portions of a statute treated differently had already been joined together and were being considered simultaneously when the language raising the implication was inserted." *Lindh v. Murphy*, 521 U.S. 320, 330 (1997); *see also Field v. Mans*, 516 U.S. 59, 75 (1995) ("The more apparently deliberate the contrast, the stronger the inference, as applied, for example, to contrasting statutory sections originally enacted simultaneously in relevant respects . . . ."); *United States v. Granderson*, 511 U.S. 39, 63 (1994) (Kennedy, J., concurring) ("The

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such review," the proposed language in § 2255 was not similarly altered. Pet. Br. at 24-26 (citing S. 623, 104th Cong. § 2 (1995)) (internal quotation marks omitted).

Otherwise, as the government expressly suggests, the legislative history of AEDPA is not especially helpful in interpreting § 2255's limitations period, *see* Gov't Br. at 22 n.6; this is no doubt why the parties place very little emphasis on it. The government has identified two House Reports, separated by more than a decade, that were part of the very long legislative process leading up the enactment of AEDPA and that used the § 2244 language to describe the § 2255 time bar, *see id.*, but these Reports are not dispositive of Congress's intent. Neither one, of course, is the report for S. 735, the bill that was actually enacted as AEDPA in 1996 following the Oklahoma City bombing. *See* H.R. Rep. No. 104-23, at 16 (1995) (discussing H.R. 729); S. Rep. No. 98-226, at 30 (1983) (discussing S. 1763); *see also* H.R. Conf. Rep. No. 104-518 (1996), *reprinted in* 1996 U.S.C.C.A.N. 944 (report to accompany S. 735). Further, Congress's passing use in a Committee Report of a phrase that was eventually included in the statute in a provision *other* than § 2255 cannot trump § 2255's actual language. Congress obviously thought that the phrase in question was important enough to form part of the text of the law where it was relevant and applicable, and presumably made a conscious choice not to use the phrase – which is nowhere mentioned in the conference report discussing the enacted bill – in § 2255 itself. *See generally, e.g., Bailey v. United States*, 516 U.S. 137, 150 (1995) (explaining that "Congress knew how to draft a statute to reach a firearm that was 'intended to be used,'" but did not draft the provision at issue that way).

presumption loses some of its force when the sections in question are dissimilar and scattered at distant points of a lengthy and complex enactment. But in this case, given the parallel structure of [the provisions] and the fact that Congress enacted both provisions in the same section of the same Act, the presumption is strong."); *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991); Pet. Br. at 20 (explaining that § 2244 and § 2255 should be read together because they deal with the same issue and were enacted contemporaneously); Gov't Br. at 19-20.

It is true that in *Lindh* this Court identified one specific portion of AEDPA as inartfully drafted. *See Lindh*, 521 U.S. at 336. But *Lindh* itself, while acknowledging this statutory "loose end," was nevertheless decided on the basis of a detailed textual examination of AEDPA's provisions and on a negative implication drawn by comparing one chapter of AEDPA to another: "We read this provision of § 107(c), expressly applying chapter 154 to all cases pending at enactment, as indicating implicitly that the amendments to chapter 153 were assumed and meant to apply to the general run of habeas cases only when those cases had been filed after the date of the Act." *Id.* at 327.

In addition, this Court has *expressly* applied the *Russello* canon of interpretation to AEDPA provisions on two separate occasions. In *Hohn v. United States*, 524 U.S. 236 (1998), this Court found that "[t]he clear limit on this Court's jurisdiction to review denials of motions to file second or successive petitions by writ of certiorari contrasts with the absence of an analogous limitation to certiorari review of denials of applications for certificates of appealability," and relied on this comparison in concluding that it had jurisdiction to consider denials of certificate applications. *Id.* at 250-51 (quoting *Bates* and *Russello*). More recently, in *Duncan v. Walker*, 533 U.S. 167 (2001), this Court interpreted the words "State post-

conviction or other collateral review" in § 2244(d)(2) to exclude a federal habeas motion, and in doing so compared the provision to other sections of AEDPA in which "Congress specifically used both the words 'State' and 'Federal' to denote state and federal proceedings." *Id.* at 172-73 (quoting *Bates* and *Russello*); *see also, e.g.*, *Smaldone v. Senkowski*, 273 F.3d 133, 137 (2d Cir. 2001) (interpreting § 2244(d)(2) by comparing it to § 2244(d)(1)(A), and noting that at least seven other Courts of Appeals have done the same), *cert. denied*, 122 S. Ct. 1606 (2002). Accordingly, the mere status of provisions as part of the AEDPA enactment does not exclude them from the operation of the *Russello* principle.

Nor, as petitioner and the government claim, does application of the *Russello* principle preclude reading "final" in § 2255 to refer to "the conclusion of direct review" merely because this phrase appears in § 2244 along with the phrase "the expiration of the time for seeking such review." *See* Pet. Br. at 26-27; Gov't Br. at 28; *see also United States v. Garcia*, 210 F.3d 1058, 1060 (9th Cir. 2000); *Burch*, 202 F.3d at 1278. Under the *Russello* canon, Congress's use of different language in the two sections strongly implies that the sections mean different things – not that they cannot overlap in any way.

The parties' argument simply disregards the linguistic realities of § 2244. That provision is plainly written to specify two particular circumstances in which the judgment should be deemed to have become final for purposes of state habeas petitions, and to ask which one is the "latest." It would have made no sense for Congress to have written the statute to say – as the parties would seemingly require as a prerequisite for the application of *Russello* – that the limitation period runs from "the date on which the judgment became final or the expiration of time for seeking direct review." Instead, § 2244 sets up a comparison of finality triggers, and this requires the two alternative triggers to be placed side by side and held up for

examination. *See Webster's Third New Int'l Dictionary* 1585 (1993) (stating that "or" is used as a "function word to indicate . . . an alternative between different or unlike things, statuses, or actions").

Thus, § 2244 is most sensibly read to contrast the more specific phrase "the expiration of the time for seeking [direct] review" with the more general phrase "the conclusion of direct review." The general is listed first, and the more specific is then contrasted with it. Thus, even if the first-listed general phrase is identical to what was intended in § 2255, there was simply no reason in that provision, which contains no such contrast, for Congress to spell out the meaning that is more commonly understood by the bare term "final."[4] Accordingly, the *Gendron* and *Torres* courts appropriately understood "the expiration of the time for seeking [direct] review" in § 2244 as an *additional* element, one that was significantly absent from the comparable limitation provision for federal prisoners. The application of *Russello* by the Fourth and Seventh Circuits was not selective – rather, it was sensitive to Congress's diction and sentence construction in the particular provisions at issue. *See Gendron*, 154 F.3d at 674; *Torres*, 211 F.3d at 839-40. *See generally Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (refusing to read "jurisdiction" in 28 U.S.C. § 1500 as meaning "jurisdiction to render judgment" when the latter, more elaborated phrase appeared in several "nearby sections of title 28").

The parties attempt to create the illusion that, under the logic of *Russello*, anything listed in § 2244 and not listed in

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[4] Of course, if "final" in § 2255 means something even narrower than the "conclusion of direct review," the *Russello* problem that the parties conjure disappears altogether. *See* pp. 22-27, *infra*. This discussion assumes, without conceding the point, that the premise of the parties' argument is correct.

§ 2255 must necessarily be excluded from § 2255, an argument that depends on conflating *Russello* with the distinct (though related) *expressio unius* canon. But mutual exclusivity is not in any way a precondition of *Russello*; rather, the difference between the language of the provisions reflects a *difference* in scope – the two provisions cannot have exactly the same meaning. For this reason, *Russello* can readily be applied even where, for instance, one of the two statutory provisions being compared defines a category that is a subset of the category defined in the other provision – indeed, as described above, that was the case with *Russello* itself. Accordingly, reading "final" in § 2255 to refer to the conclusion of direct review fully adheres to *Russello*, because it gives content to Congress's use of language in that section that differs from the language used in § 2244. In contrast, the parties' position would give the two statutes *identical* meanings despite their different language.

c. *Section 2263 reinforces this analysis*. Finally, contrary to the parties' contentions, an examination of § 2263, a more specialized provision that applies to state prisoners serving capital sentences in certain qualifying states, only tends to reinforce what the comparison of § 2244 and § 2255 demonstrates. Section 2263, echoing § 2244, provides that its 180-day limitation period begins running "after final State court affirmance of the conviction and sentence on direct review or the expiration of time for seeking such review." 28 U.S.C. § 2263(a). Although § 2263 is less similar in general wording and structure to § 2255 than is § 2244, it is nonetheless "significant that Congress did not choose, as it did in § 2263, to use language in § 2255 that affirmatively expands the period of time before the start of the limitation period" for prisoners who choose not to seek further available review. *Torres*, 211 F.3d at 840.

It is true, as petitioner points out, that § 2263 also includes a tolling provision, stating that "[t]he time requirements . . .

shall be tolled . . . from the date that a petition for certiorari is filed in the Supreme Court until the date of final disposition of the petition." 28 U.S.C. § 2263(b)(1). That tolling provision is obviously included because the § 2263 limitation period is triggered by the date of affirmance, rather than the date the judgment becomes final. Although there is a well-developed body of law suspending "finality" when additional review is sought, of which Congress is presumed to be aware, *see infra* Part II, Congress can obviously avoid the application of that law by selecting a specific date on which a judgment is deemed to become final, and Congress's express selection of the date of affirmance in § 2263 has that effect. But the absence of such a tolling provision from § 2255 is devoid of significance in this case. It does not tell this Court anything about how Congress wished § 2255 movants who did *not* file a petition for certiorari to be treated. *See Torres*, 211 F.3d at 840. Indeed, if anything, the absence of any tolling provision in § 2255 can be read to indicate that Congress did not wish for equitable tolling to be applied in that context, and thus intended for federal prisoners – who, after all, have already received some federal court review of their cases – to file any § 2255 motion promptly regardless of whether a petition for certiorari actually was pending. That construction certainly does not help petitioner.

Accordingly, reading § 2255 together with § 2244 and § 2263 precludes the parties' arguments that a federal prisoner who fails to file a petition for certiorari is nevertheless entitled to an extra sixty-nine days – above and beyond the one year from final judgment provided by Congress – in which to prepare and file a § 2255 motion.

II. IN MOST CONTEXTS AND FOR MOST PURPOSES, A JUDGMENT OF A COURT "BECOMES FINAL" WITHOUT REGARD TO THE EXPIRATION OF THE TIME FOR FURTHER REVIEW.

1. It is not the case that a judgment of conviction ordinarily "becomes final" only when the time expires to petition this Court for a writ of certiorari (or this Court resolves a petition that has been filed), as the parties essentially urge here. Rather – and particularly with regard to the commencement of statutes of limitation and other time bars – it has been broadly established that a judgment "becomes final" when the Court of Appeals issues its mandate in connection with the direct appeal as of right, *without* regard to the possibility of further discretionary proceedings, *unless* a stay of the mandate is obtained.[5]

a. *Rule 33.* Until it was recently amended, Rule 33 of the Federal Rules of Criminal Procedure provided that a motion for a new trial based on newly discovered evidence must be filed "before or within *two years after final judgment*." Fed. R. Crim. P. 33 (version in existence prior to Dec. 1, 1998) (emphasis added), *quoted in United States v. Lussier*, 219 F.3d 217, 218 (2d Cir. 2000).[6] Courts uniformly held that this time

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[5] This Court frequently has noted the difference between appeals as of right and discretionary review proceedings. *See, e.g., Ross v. Moffitt*, 417 U.S. 600, 612, 616-18 (1974).

[6] This Rule is particularly noteworthy because, in the legislative history of an early formulation of the § 2255 time bar noted by the government, *see* Gov't Br. at 22 n.6, Congress indicated that it sought to enact a statute of limitations under § 2255 that would be comparable to the time bar that existed under this version of Rule 33. *See* S. Rep. No. 98-226, at 9-10 (1983). The Report noted the absence of a time limitation under § 2255 and explained:

bar was triggered when the Court of Appeals issued its mandate of affirmance, regardless of the possibility of further review.

Thus, in *United States v. Cook*, 705 F.2d 350 (9th Cir. 1983), the court explained that courts had construed "final judgment" under Rule 33 as "the date on which the appellate process 'is terminated.'" *Id.* at 351 (citations omitted). The court continued: "The appellate process is terminated – and thus the two-year period begins to run – when an appellate court issues its mandate of affirmance." *Id.* The court in *Cook* specifically rejected an argument that the two-year period did not begin to run until the Supreme Court had denied a petition

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> [T]he absence of a time limit is at odds with the approach taken in other contexts by Federal law to the review or re-opening of judgments. For example, a Federal defendant must normally decide whether to appeal within 10 days, . . . and a Federal defendant seeking re-trial on grounds of newly discovered evidence [under Rule 33] must do so within 2 years of final judgment. The last-mentioned limitation has the particularly curious effect that a Federal prisoner who discovers proof of his innocence more than two years after final judgment has no judicial remedy, but must seek executive clemency, while a State or Federal prisoner who asserts violations of Constitutional rights . . . is afforded a federal judicial remedy without limitation of time. The time limitation rule of [the bill at hand] would reduce this discrepancy, bringing the availability of collateral relief *into closer conformity with the approach taken by federal law in other contexts to maintenance of orderly procedures and assurance of finality* in criminal adjudication.

Id. (emphasis added) (footnote omitted). The parallel between Rule 33 and § 2255 also is apt because a motion under § 2255, like a motion under Rule 33, was viewed by Congress as a further step in the defendant's *criminal* case. *See, e.g., United States v. Frady*, 456 U.S. 152, 182 (1982) (Brennan, J., dissenting) (quoting S. Rep. No. 80-1526, at 2 (1948)). In 1998, Rule 33 was revised to provide that a motion for a new trial based on newly discovered evidence may be made only within three years after the verdict or finding of guilty.

for certiorari that the defendant had filed. *Id.* The court explained: "Cook's argument would have merit if he had obtained a stay of our mandate pending his application to the Supreme Court for a writ of certiorari. Cook, however, did not obtain (or even seek to obtain) a stay of our mandate before he sought review in the Supreme Court. The mandate having been issued and neither stayed nor recalled, the Supreme Court's action on his certiorari petition is thus irrelevant to the issue of the timeliness of his Rule 33 motion." *Id.* (citation omitted).

Other courts similarly held that "the appellate process terminate[d]" and the judgment became "final" for purposes of the two-year limitation period of Rule 33 when the Court of Appeals issued its mandate of affirmance – and that the filing of a petition for certiorari was irrelevant unless the defendant first obtained a stay of the mandate. *See, e.g., United States v. Spector*, 888 F.2d 583, 584 (8th Cir. 1989); *Lussier*, 219 F.3d at 218-19. In *Lussier*, the Second Circuit explicitly held that a motion filed more than two years after the Court of Appeals had issued its mandate of affirmance, but *within* two years of this Court's denial of a petition for certiorari, "was filed more than two years after the judgment *became final*." 219 F.3d at 218 (emphasis added). Because the defendant had not obtained a stay of the mandate, the court rejected the defendant's argument that "the original judgment did not become 'final' until the Supreme Court denied certiorari." *Id.* The court reasoned that "appellate courts remain in control of the date for issuing mandates and generally delay issuance [pursuant to Fed. R. App. P. 41(d)] only when the merits of a criminal appeal are of sufficient substance to make Supreme Court review at least a reasonable possibility." *Id.* at 218-19 (quoting *United States v. Reyes*, 49 F.3d 63, 68 (2d Cir. 1995)) (internal quotation marks omitted); *see also United States v. Biaggi*, 823 F. Supp. 1151, 1160 (S.D.N.Y. 1993) (stating that "movants provide no case law to support their contention[] that . . . the denial of

certiorari amounts to a final judgment"), *aff'd*, 48 F.3d 1213 (2d Cir. 1994) (unpub. table decision).[7] Thus, the established practice under Rule 33 was that a judgment became "final" upon the issuance of the mandate of the Court of Appeals and the two-year limitation period began to run on that date – *not* the date that time expired to file a petition for certiorari.[8]

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[7] In numerous other cases in which a petition for certiorari was *not* filed, courts similarly held that the judgment became "final" and the two-year limitation period in Rule 33 began to run when the Court of Appeals issued its mandate of affirmance, and not when the time expired to file a petition for certiorari. *See, e.g., Romero v. United States*, 28 F.3d 267, 268 (2d Cir. 1994) (judgment final upon "the date of the issuance of the mandate of affirmance"); *United States v. Dayton*, 981 F.2d 1200, 1203 (11th Cir. 1993) ("the return of the mandate"); *United States v. Gross*, 614 F.2d 365, 366 n.2 (3d Cir. 1980) ("the date when the appellate court issues its mandate"); *United States v. Granza*, 427 F.2d 184, 185 n.3 (5th Cir. 1970) ("issuance of the mandate of affirmance"); *Casias v. United States*, 337 F.2d 354, 356 (10th Cir. 1964) ("mandate of affirmance"); *Harrison v. United States*, 191 F.2d 874, 876 (5th Cir. 1951) ("mandate of affirmance").

[8] Significantly, the same reasoning employed under Rule 33 has been used by the Courts of Appeals to hold that the possibility of further discretionary review in this Court on a petition for *rehearing* does *not* warrant the conclusion that the judgment of conviction is not "final" within the meaning of § 2255. The Rules of this Court specifically allow a petition for rehearing to be filed within twenty-five days after the date of an order denying a petition for certiorari, so long as the petition is "limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented." S. Ct. R. 44(2). However, unless the decision denying a petition for certiorari is *suspended* by a Justice or the Court, the order denying the petition is effective regardless of the right to seek rehearing. *See* S. Ct. R. 16(3) ("The order of denial [of a petition for certiorari] will not be suspended pending disposition of a petition for rehearing except by order of the Court of a Justice"). On the basis of this Rule, the Courts of Appeals have held unanimously that – even though Rule 44.2 defines circumstances in which rehearing (and therefore further proceedings on "direct" review) could be appropriate – a judgment of conviction "becomes final" within the meaning of § 2255 when this Court denies a petition for certiorari. *See, e.g., United States v. Segers*, 271 F.3d

b. *Speedy Trial Act*. A similar rule has been applied under the Speedy Trial Act. Using the same words as in § 2255, Congress provided that the time for trying or retrying a criminal defendant following an appeal, a mistrial, an order for a new trial, or a collateral attack "shall commence within seventy days from the date the action occasioning the trial [or retrial] *becomes final*." 18 U.S.C. § 3161(d)(2) (emphasis added) (trial); *id.* § 3161(e) (retrial). In cases involving trials or retrials following an appeal, it is broadly established that the date the action occasioning the trial or retrial "becomes final" is the date the Court of Appeals issues its mandate. *See, e.g.*, *United States v. Kington*, 875 F.2d 1091, 1109 (5th Cir. 1989) ("an appellate disposition occasioning a retrial *becomes final* on the date when the appellate court issues its mandate" (emphasis added)); *United States v. Rivera*, 844 F.2d 916, 920 (2d Cir. 1988) ("an appeal *becomes final* on the date the mandate is issued" (emphasis added)); *United States v. Felton*, 811 F.2d 190, 198 (3d Cir. 1987) (en banc) ("The action of a court of appeals does not become final until its mandate is issued. . . . [W]e agree with the district court that the language of the statute ('the date the action . . . becomes final') requires that the date of issuance [of the mandate] be the point of departure."); *United States v. Robertson*, 810 F.2d 254, 259 & n.6 (D.C. Cir. 1987); *United States v. Scalf*, 760 F.2d 1057, 1059 (10th Cir. 1985); *United States v. Ross*, 654 F.2d 612, 616 (9th Cir. 1981); *see also United States v. Cheek*, 3 F.3d 1057, 1065 (7th Cir. 1993).[9]

181, 186 (4th Cir. 2001) (judgment becomes final "absent the issuance of a suspension order by the Court or a Justice thereof"), *cert. denied*, 122 S. Ct. 1331 (2002); *United States v. Willis*, 202 F.3d 1279, 1280 (10th Cir. 2000) (denial of certiorari is final "absent an actual suspension of an order denying certiorari by the Court"); *Giesberg v. Cockrell*, 288 F.3d 268, 271 (5th Cir.), *petition for cert. filed*, 71 U.S.L.W. 3283 (U.S. Sept. 27, 2002) (No. 02-522); *Horton v. United States*, 244 F.3d 546, 551 (7th Cir. 2001); *Washington v. United States*, 243 F.3d 1299, 1300 (11th Cir. 2001); *United States v. Thomas*, 203 F.3d 350, 356 (5th Cir. 2000).

In *Scalf*, the court specifically held that, in order for a judgment to "become final" within the meaning of 18 U.S.C. § 3161, it is *not* necessary for the government's time to petition for certiorari to expire. The court rejected the government's argument that "the time period does not begin to run or is tolled while [the Solicitor General's] office makes a decision on whether or not to seek certiorari on the previous appeal," explaining that "[w]e have already held that the period begins to run when the mandate of the appellate court is issued. An application to seek certiorari or a decision to make such application *has no effect on the finality of an appellate decision* unless the mandate of the court is stayed or withdrawn in connection with such event." *Scalf*, 760 F.2d at 1059 (emphasis added).

c. *Other*. The same rule has been applied in other contexts involving statutes of limitations. *See, e.g.*, *Glick v. Ballentine Produce, Inc.*, 397 F.2d 590, 593 (8th Cir. 1968) (holding that limitation period provided by Missouri "savings" statute began to run when dismissal of earlier action was affirmed on appeal and Court of Appeals issued its mandate, because "[w]e find no support for the contention that the filing of a petition for a writ of certiorari prevents the judgment of this court from becoming final until the Supreme Court acts upon the petition, where no stay of mandate has been filed").

Thus, it is commonly understood, particularly with regard to the commencement of limitation periods, that a judgment

[9] A few courts modified this rule slightly, holding that the speedy trial clock resumed when the district court *received* the mandate. *See, e.g.*, *United States v. Long*, 900 F.2d 1270, 1276-77 (8th Cir. 1990); *United States v. Lasteed*, 832 F.2d 1240, 1243 (11th Cir. 1987).

"becomes final" when it is affirmed on the direct appeal as of right, *regardless* of the possibility of further discretionary proceedings, *unless* a stay of the mandate of affirmance is obtained. This Court may presume that Congress was familiar with this settled law, particularly given Congress's reference to Rule 33 in the early legislative history discussed above. *See supra* note 6; *Holloway v. United States*, 526 U.S. 1, 9 (1999) ("it is reasonable to presume that Congress was familiar with the cases and the scholarly writing" interpreting particular terms); *Cannon v. University of Chicago*, 441 U.S. 677, 696-98 (1979) (presuming congressional knowledge of interpretation of similarly worded earlier statute); *United States v. Merriam*, 263 U.S. 179, 187 (1923) (Congress presumed to intend judicially settled meaning of terms). Certainly, within the contexts presented by these decisions, the finality of a judgment is *not* dependent upon the expiration of the time to file a petition for certiorari in this Court.

2. The rule that a judgment becomes final upon the issuance of the mandate of the Court of Appeals, *without* regard to the expiration of the time to file a petition for certiorari, also is consistent with the ordinary operation of judgments. Judgments of all kinds of all courts, trial and appellate, become "final" *without regard to the expiration of the time for review*.[10]

Thus, with respect to the judgment of a trial court, "[t]raditionally, a 'final judgment' is one that is final and

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[10] At bottom, the meaning of the words "becomes final" cannot be separated from the meaning of "final." The word "become" or "becomes" generally means simply "to come to exist" or "to come to be" something – in this case, *final*. *See Webster's Third New Int'l Dictionary* 195 (1993). *Cf. Mitchell v. United States*, 526 U.S. 314, 326 (1999) (holding that the defendant's privilege against self-incrimination following the entry of a guilty plea expires when "the sentence has been fixed and the judgment of conviction has *become final*" (emphasis added)).

appealable." *Melkonyan v. Sullivan*, 501 U.S. 89, 95 (1991). In *Melkonyan*, the Court noted that Congress had added an "unusual" definition of final judgment in the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(2)(G), as one that is "final and not appealable." *See Melkonyan*, 501 U.S. at 95. Significantly, it is that same "unusual" definition – that a "final" judgment is one that is not appealable (and for which a petition for certiorari may no longer be filed) – that the parties seek to adopt as the ordinary meaning of the words "becomes final" in § 2255.

The same rule applies with respect to the "finality" of the judgment of an appellate court. A judgment of the Court of Appeals is final when it fully resolves the appeal and leaves nothing left to be decided. *See, e.g., Scofield v. NLRB*, 394 U.S. 423, 427 (1969) (explaining that a judgment of a Court of Appeals "'for our purposes is final when the issues are adjudged' and settled with finality" (quoting *Market St. Ry. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945))); *FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 212-13 (1952) (stating that, despite the fact that only a second judgment of the Court of Appeals was marked "final," an earlier judgment "was for all purposes final," because "[i]t put to rest the questions which the parties had litigated in the Court of Appeals" and "was neither 'tentative, informal nor incomplete'" (citation omitted)).[11]

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[11] In the *Market Street Railway* case, the Court explained, with regard to a state rule that provided that a judgment of the California Supreme Court generally became final 30 days after filing: "The judgment for our purposes is final when the issues are adjudged. Such finality is not deferred by the existence of a latent power in the rendering court to reopen or revise its judgment. The waiting period prescribed by the statute here seems to reserve a power of that character. The decision during this period does not lack the attributes of an adjudication, *it is not awaiting lapse of time to become a judgment*, it merely is subject to modification." *Market St. Ry.*

Absent a stay, judgments of both trial and appellate courts generally are "final" and enforceable without regard to the expiration of the time for review. Thus, in a criminal case, the defendant may be incarcerated in accordance with the sentence despite the opportunity for appeal, unless a stay is granted in accordance with Federal Rule of Criminal Procedure 38(b) and Federal Rule of Appellate Procedure 9(b). In a civil case, the brief "automatic stay" of execution of judgment does not extend to the time for appeal, *see* Fed. R. Civ. P. 62(a), and the judgment may be executed unless a supersedeas bond is obtained and approved by the Court, *see* Fed. R. Civ. P. 62(d).

Similarly, upon entry of the judgment of a Court of Appeals (which generally occurs upon issuance of the court's opinion, *see* Fed. R. App. P. 36), the ninety-day period in which to petition for certiorari begins to run. *See* S. Ct. R. 13(3). However, before that time expires, the "mandate" of the Court of Appeals generally will issue. *See* Fed. R. App. P. 41(b).[12] And "the mandate is effective when issued," Fed. R. App. P. 41(c) – regardless of the fact that a petition for certiorari still may be filed. In order to avoid the dictates of the mandate pending the resolution of a petition for certiorari, a party must affirmatively seek a stay of the mandate, as is expressly authorized by Federal Rule of Appellate Procedure 41(d)(2).

Co., 324 U.S. at 551 (emphasis added).

[12] Rule 41(b) provides: "The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time." Fed. R. App. P. 41(b). A petition for panel rehearing or rehearing en banc generally must be filed within fourteen days after entry of judgment. Fed. R. App. P. 35(c), 40(a)(1). Thus, in the absence of a petition for rehearing, the mandate typically issues twenty-one days after judgment, well within the time that a petition for certiorari may be filed.

Thus, both at trial and on appeal, a judgment of a court generally becomes "final" and operative "when the issues are adjudged." *Market St. Ry. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945). Such a pronouncement of a court, though subject to the possibility of further review and modification, "is not awaiting lapse of time to become a judgment" or to become final. *Id.* Thus, under the most common understanding of the words, the judgment of the Court of Appeals affirming petitioner's conviction was *not* dependent upon the expiration of the time to file a petition for certiorari in order to "become final."

3. It also is firmly established that the finality of a judgment that has otherwise "become final" may be suspended by certain post-judgment filings. Significantly, however, it is only the *actual filing* of such an application that suspends the finality of the judgment and arrests the application of time bars that are triggered by the entry of that judgment. These rules therefore again illustrate the general rule that a judgment "becomes final" upon the date of entry by the court, *not* the date when time expires for further review.

For example, it long has been established in both civil and criminal cases that a timely motion for a new trial or for reconsideration acts to suspend the finality of a judgment, and the time to appeal does not begin to run until the motion for a new trial or for reconsideration is decided. *See, e.g., Brockett v. Brockett*, 43 U.S. (2 How.) 238, 241 (1844) (Story, C.J.); *United States v. Ellicott*, 223 U.S. 524, 539 (1912); *Morse v. United States*, 270 U.S. 151, 153-54 (1926) ("There is no doubt under the decisions and practice in this Court that where a motion for a new trial in a court of law, or a petition for a rehearing in a court of equity, is duly and seasonably filed, it suspends the running of the time for taking a writ of error or an appeal, and that the time within which the proceeding to review must be initiated begins from the date of the denial of either the

motion or petition."); *United States v. Healy*, 376 U.S. 75, 78 (1964); *United States v. Ibarra*, 502 U.S. 1, 6 (1991) (a motion for rehearing in a criminal case, like a motion for rehearing in a civil case, "renders an otherwise final decision of a district court not final until it decides the petition for rehearing").[13]

The rule has been applied broadly to judgments of appellate courts as well as trial courts. Thus, the filing of a timely petition for rehearing in the Court of Appeals "operates to suspend the finality of the . . . court's judgment," *Department of Banking of Neb. v. Pink*, 317 U.S. 264, 266 (1942), and has the effect of "tolling the start of the period in which a petition for certiorari must be sought," *Missouri v. Jenkins*, 495 U.S. 33, 45 (1990). Similarly, a timely petition to reopen or reconsider an order of an agency "stay[s] the running of the . . . limitation period" for judicial review. *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270, 284 (1987).

Several features of the rules established in these cases are significant. First, the Court often has determined that a post-judgment filing operates to arrest the running of a time bar for further review despite the lack of any statutory authority for such a rule, and despite the fact that the time bar at issue is otherwise jurisdictional and cannot be extended. Thus, in *Healy*, this Court noted that "[a]ppellees place great reliance on the absence of any statute or rule governing the effect of rehearing petitions of the Government," but the Court accepted and applied the rules previously established in other civil and criminal cases, which it noted also "lack such a foundation."

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[13] These rules do not involve "tolling" in the classic sense, in that the time bars at issue have been held to run again, in full, once the petition for reconsideration is resolved. *See Ibarra*, 502 U.S. at 4 (explaining that issue is better described in terms of when time bar begins to run, rather than in terms of tolling, because, where doctrine applies, time bar runs in full from date of subsequent decision).

Healy, 376 U.S. at 79. Indeed, in *Locomotive Engineers*, the Court ruled that a petition to reopen or reconsider an agency decision stayed the running of the limitation period for judicial review despite the existence of statutory language that, "notwithstanding" the authority of the agency to reopen and reconsider its orders, "an action of the Commission . . . is final on the date on which it is served." *Locomotive Eng'rs*, 482 U.S. at 284; *see also Jenkins*, 495 U.S. at 45 n.13 (noting that practice of "tolling" time to petition for certiorari upon application for rehearing "is *now* reflected in this Court's Rule 13.4" (emphasis added)); *compare Department of Banking*, 317 U.S. at 266.[14]

Second, it is only the actual and timely filing of an appropriate motion for reconsideration or other review that suspends the finality of the judgment and the application of the time bar at issue. If no such petition is timely filed, the time limitation begins to run when the judgment originally was entered – *not* when the time to file the petition expires. *See, e.g., Morse*, 270 U.S. at 154 ("The suspension of the running of the period limited for the allowance of an appeal, after a judgment has been entered, *depends upon the due and seasonal filing* of the motion for a new trial or the petition for rehearing." (emphasis added)); *Bowman v. Loperena*, 311 U.S. 262, 266 (1940); *Browder v. Director, Dep't of Corr.*, 434 U.S. 257, 264-65 (1978).

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[14] It also is noteworthy that, in several instances, the filing that operated to arrest the running of a jurisdictional time bar occurred a considerable time after the judgment was entered. *See, e.g., Ellicott*, 223 U.S. at 538-39 (government motion for a new trial filed 84 days after judgment operated to suspend finality of judgment); *Healy*, 376 U.S. at 78 (in the absence of a rule specifying a different time limit, government petition for rehearing would be considered timely "when filed within the original period for review" on appeal).

Although it is widely established that a timely petition for reconsideration or rehearing filed in the court that rendered the judgment operates to suspend the finality of the judgment and to arrest the application of time bars that are triggered by the entry of that judgment, the effect of a filing for further review in *another* court is less uniform. With regard to statutes of limitations, however, it often has been held that the actual filing of an appeal as of right suspends the running of a statute of limitations triggered by the entry of the judgment from which the appeal is taken. *See, e.g., Morales v. City of Los Angeles*, 214 F.3d 1151, 1155 (9th Cir. 2000) (holding, under California law, that statutes of limitation are tolled during an appeal, but begin to run again when the appellate court issues a final judgment, and concluding that this result is "not inconsistent with federal law"). In these cases, however, the finality of the judgment – and the running of the statute – is not dependent on the expiration of the time for further review; rather, the statute is tolled only if an appeal actually is filed.

As described above, however, a judgment generally *is* deemed to "become final" for purposes of the commencement of a statute of limitations despite the filing of a petition for certiorari or other discretionary review, unless a stay is obtained. *See* pp. 22-27, *supra*. Authority is slight in which a judgment is not deemed to "become final" for purposes of the commencement of a statute of limitations until a filed petition for certiorari is resolved.[15] But, in any event, the general rule

[15] The Judicial Conference of the United States, construing the provisions of the Speedy Trial Act discussed above, *see* pp. 26-27, *supra*, confirmed that the statute is not "reasonably interpreted as justifying delay for the entire period within which an appeal from a district court order could be taken or a petition for Supreme Court review filed." Committee on the Administration of the Criminal Law, Judicial Conference of the United States, *Guidelines to the Administration of the Speedy Trial Act of 1974*, as amended 17-20 (rev. Dec. 1979). The Conference continued, however, that

is this: while certain filings may suspend the finality of a judgment, the judgment otherwise is final – and applicable time bars begin to run – unless the filing actually is made. The finality of the judgment is not dependent on the expiration of the time to make such a filing.

4. Thus, the Court of Appeals properly applied the "ordinary" meaning of the words used by Congress in § 2255. The language of § 2255 simply declares that the one-year limitation period runs from the date the judgment of conviction "becomes final." The court's conclusion that petitioner's § 2255 motion was untimely, because it was filed more than one year after the court issued its mandate affirming petitioner's conviction – the last act on direct review – is wholly consistent with the ordinary and well-established rules regarding the finality and effectiveness of judgments. The finality of the judgment of the Court of Appeals was not dependent upon the expiration of the time for further review. Petitioner did nothing to suspend the finality of that judgment or to arrest the running of the statute of limitations. Therefore, under the principles set forth above, including the established law governing comparable motions under the former version of Federal Rule of Criminal Procedure 33 (as well as practice under the Speedy Trial Act), petitioner had one full year from the issuance of the mandate to bring a motion under § 2255.[16]

"*if an appeal or petition for certiorari is filed*, the action occasioning the retrial should not be considered final until the appeal or petition has been disposed of." *Id.* (emphasis added).

[16] Although the question is not presented here, there is authority upon which the Court could conclude that the statute of limitations would have been arrested if petitioner *actually had filed* a petition for certiorari. This Court and others often have determined that a time bar or statute of limitations may be arrested or tolled, even without explicit statutory authority, upon an actual filing for review of a judgment to which the statute of limitations is linked. *See* pp. 31-35, *supra*. *But see* pp. 22-27, *supra*. It

At bottom, the parties' position rests on the view that, without any further definition in the statute, the judgment of a court does not "become final" until the time expires for *review* of that judgment. Such a construction undermines the integrity of a judgment of a court. It is one thing to say that the actual filing of a petition for review operates to suspend the finality of a judgment and to arrest the running of a time bar or other statute of limitations tied to the existence of that judgment. Such rules of suspension promote efficiency and economy for all concerned. But finality has rarely been dependent on an action that *could* have been taken, but was not. Relying heavily on the "negative inference" presented by the omission of words in § 2255 that appear in § 2244, the court here properly held that petitioner's judgment of conviction had "become final," as provided by § 2255, when the Court of Appeals issued its mandate and the petitioner took no further action to arrest or suspend the finality of that judgment.

III. THE PARTIES' ARGUMENTS OF INCONGRUITY AND IMPRACTICALITY DO NOT UNDERMINE THE STATUTORY INTERPRETATION OF THE COURT OF APPEALS.

The parties make several policy arguments why this Court should ignore the stark differences between § 2255 and § 2244, interpret the provisions to mean exactly the same thing, and disregard settled rules regarding the finality of judgments. None of those reasons, however, withstands scrutiny.

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is noteworthy that the Courts of Appeals broadly have held that the one-year period in both § 2255 and § 2244 is a statute of limitations, subject to the doctrine of equitable tolling, rather than a jurisdictional requirement. *See, e.g., Dunlap v. United States*, 250 F.3d 1001, 1004 & n.1 (6th Cir.) (collecting cases), *cert. denied*, 122 S. Ct. 649 (2001).

A. This Court's Definition Of "Final" For "Purposes Of Retroactivity Analysis" Is Atypical And Based On Considerations That Are Fundamentally Different From Those At Issue Here.

In a series of cases, this Court has held that "[a] state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally decided." *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994); *see also, e.g., Linkletter v. Walker*, 381 U.S. 618, 622 n.5 (1965); *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987); *Teague v. Lane*, 489 U.S. 288 (1989). The parties contend that this is the most logical meaning of the word "final" for purposes of the statute of limitations in § 2255 and that Congress must have intended this meaning.

At the outset, although this indisputably is a meaning of "final" that this Court has used in these cases, as noted above the Court elsewhere has described this definition of "final" as "unusual." *See* p. 29, *supra*; *Melkonyan*, 501 U.S. at 95. More fundamentally, however, it is clear that this definition of "final" for purposes of retroactivity analysis – which is not based on the language of any statute – is rooted in concerns fundamentally different from those that typically arise with regard to the determination of when a judgment "becomes final" for purposes of the commencement of a statute of limitations.

This Court's resolution of how to apply new constitutional rules has changed over time and has evoked strongly held views. *See, e.g., Griffith*, 479 U.S. at 320-22 (Court has "shifted course"); *id.* at 329-34 (White, J., dissenting); *American Trucking Ass'ns v. Smith*, 496 U.S. 167, 209-18

(1990) (Stevens, J., dissenting); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 102-10 (1993) (Scalia, J., concurring). In *Griffith*, the Court broadly established that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Griffith*, 479 U.S. at 328. The Court drew the line where it did, however, because of "basic norms of constitutional adjudication." *Id.* at 322. Repeating the words of Justice Harlan, the *Griffith* Court explained that "[i]f we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all. . . . In truth, the Court's assertion of power to disregard current law in adjudicating cases before us that have not already run the full course of appellate review, is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation." *Id.* at 323 (quoting *Mackey v. United States*, 401 U.S. 667, 679 (1971) (Harlan, J., concurring)) (internal quotation marks omitted).

The line of demarcation employed in *Griffith* was thus dictated by "the nature of judicial review," which "precludes us from '[simply] fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule.'" *Id.* (quoting *Mackey*, 401 U.S. at 679 (Harlan, J., concurring)). The Court in *Griffith* also emphasized that "selective application of new rules violates the principle of treating similarly situated defendants the same." *Id.*

Two years later, in *Teague*, the Court adopted and applied the same line of demarcation established in *Griffith* to cases arising on collateral review. Thus, *Teague* holds that "[u]nless they fall within an exception to the general rule, new

constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Teague*, 489 U.S. at 310 (plurality op.); *see also Caspari*, 510 U.S. at 389 ("The nonretroactivity principle prevents a federal court from granting habeas corpus relief to a state prisoner based on a new rule announced after his conviction and sentence become final.").

The decision in *Teague* rests heavily on the inherent (and limited) function of habeas corpus: "[T]he Court never has defined the scope of the writ simply by reference to a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error. . . . Rather, we have recognized that interests of comity and finality must also be considered in determining the proper scope of habeas review." *Teague*, 489 U.S. at 308 (plurality op.) (citing *Kuhlmann v. Wilson*, 477 U.S. 436, 447 (1986) (plurality op.)) (internal quotation marks omitted); *see also Bousley v. United States*, 523 U.S. 614, 620 (1998) ("The *Teague* doctrine is founded on the notion that one of the principal functions of habeas corpus [is] to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted. Consequently, unless a new rule of criminal procedure is of such a nature that without [it] the likelihood of an inaccurate conviction is seriously diminished, there is no reason to apply the rule retroactively on habeas review." (citations and internal quotation marks omitted)).

In sum, "for purposes of retroactivity analysis," *Caspari*, 510 U.S. at 390, the Court has drawn a sharp line between "direct" and "collateral" review, for reasons bound up with the very nature of constitutional adjudication and with the limited scope of the writ of habeas corpus. In large measure, these concepts, rather than any generalized notions of when a judgment of a court "becomes final," drove what the Court characterized as a "final" judgment for this limited purpose.

Thus, without more, it simply cannot be said that Congress must have intended the words "becomes final" in § 2255 to mean the *Griffith/Teague* formulation.

Moreover, Congress's formulation in § 2244 is analogous to the formulation in the *Griffith/Teague* line of cases, but the formulation in § 2255 markedly is *not*.[17] Thus, the very difference in language between § 2244 and § 2255 indicates that Congress did *not* intend to adopt the *Griffith/Teague* definition under § 2255. And, as explained below, there are valid reasons why Congress may have chosen to adopt the "unusual" *Griffith/Teague* concept of finality in § 2244, but not in § 2255.[18]

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[17] *Compare* 28 U.S.C. § 2244(d)(1)(A) (judgment "became final by the conclusion of direct review or the expiration of the time for seeking such review") *with Griffith*, 479 U.S. at 321 n.6 ("By 'final,' we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied"). *But see* 28 U.S.C. § 2255 para. 6(1) ("becomes final").

[18] By the same token, it is no help to contend that this Court should "presume" that Congress "expected" § 2255 to be read in conformity with "this Court's precedents" – for which the parties selectively have chosen the *Griffith/Teague* line of cases. *See* Pet. Br. at 14-16; Gov't Br. at 17 (quoting *United States v. Wells*, 519 U.S. 482, 495 (1997)). Because the *Griffith/Teague* line provides only one of several definitions of "finality" that this Court has established, to "presume" that Congress intended to apply *this* formulation of "final" is simply to assume, without analysis, the answer to the very question in this case.

B. The Differences In Collateral Review Of State And Federal Convictions, And Indeed The *Griffith/Teague* Cases, Support The Different Meanings Of § 2255 And § 2244.

The government asserts that "[t]here is no plausible reason why Congress would have chosen a different definition of 'finality' to apply to federal prisoners under Section 2255 than to state prisoners under Section 2244." Gov't Br. at 29; *see also* Pet. Br. at 20-21. At the outset, it is not necessary for this Court to divine and find sufficient a reason for what Congress has done; the critical point is that the language of § 2255 is plainly and materially different from the language of § 2244, and – *particularly* given that difference – there is no reason to impose upon the language of § 2255 an *atypical* requirement that a judgment "becomes final" only upon the expiration of the time for review. *See, e.g., Great-West Life & Annuity Ins. Co. v. Knudson*, 122 S. Ct. 708, 717 (2002) ("It is . . . not our job to find reasons for what Congress has plainly done; and it is our job to avoid rendering what Congress has plainly done . . . devoid of reason and effect."); *Mansell v. Mansell*, 490 U.S. 581, 594 (1989) ("we decline to misread the statute in order to reach a sympathetic result when such a reading requires us to do violence to the plain language of the statute").

Nevertheless, there *are* reasons why Congress would treat claims under § 2255 and § 2254 (to which § 2244 relates) differently, a point made clear in part by the very cases on which the parties heavily rely. Although § 2255 and § 2254 both involve collateral review of criminal convictions and are certainly appropriately compared to each other, the nature of the two kinds of proceedings is still very different. Under § 2254, a state prisoner commences a civil action in federal court; a § 2255 motion is simply a further step in a federal prisoner's criminal case. *See, e.g., United States v. Frady*, 456

U.S. 152, 182 (1982) (Brennan, J., dissenting) (quoting S. Rep. No. 80-1526, at 2 (1948)). As a result, courts acting on § 2254 petitions can address only wrongful custody, but courts considering § 2255 motions can provide a broader range of relief, such as correcting sentences and granting new trials. *See* Rule 1 Governing Section 2255 Proceedings for the United States District Courts advisory committee's note. More importantly, federal habeas review of state convictions pursuant to § 2254 involves the *reconsideration* of federal claims that first must have been raised and fully exhausted in state court, *see* 28 U.S.C. § 2254(b)(1)(A), whereas a federal prisoner generally may only raise claims in a § 2255 motion that were *not* already considered on direct appeal, and must justify his failure to raise these claims earlier. *See generally Withrow v. Williams*, 507 U.S. 680, 721 (1993) (Scalia, J., concurring in part and dissenting in part); *Kaufman v. United States*, 394 U.S. 217, 227 (1969). Given these differences, there is no reason why in establishing limitation periods Congress would have insisted on treating federal prisoners who do not seek discretionary review exactly the same way as state prisoners who fail to seek such review.

Moreover, the very concept of "finality" invoked by the parties as most applicable here, based on the decisions of this Court in *Griffith* and *Teague*, suggests why a different limitation period under § 2244 and § 2255 "makes perfectly good sense." *Beach*, 523 U.S. at 418. There is longstanding authority that a state prisoner may not seek a writ of habeas corpus from a federal court until the time has expired for the state prisoner to file a petition for certiorari on direct review.[19]

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[19] At one point, the "exhaustion" rule required a state prisoner to first *seek* review in this Court, typically by filing a petition for a writ of certiorari, so that this Court (rather than a lower federal court) might first review the state court judgment. *See Darr v. Buford*, 339 U.S. 200, 207 (1950).

This practice is consistent with the notions of federalism and comity at issue in *Teague*: in a case in which the state prisoner's conviction has not yet become "final" under *Griffith*, and this Court announces a new rule applicable to a claim exhausted on direct appeal, the practice encourages a state prisoner to file a petition for certiorari and allows this Court simply to "grant, vacate and remand" the case to the state court so that it can consider and apply the new rule in the first instance.[20] Because a state prisoner cannot or should not file a petition for habeas corpus under § 2254 until the time to file a

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Although this is no longer required, *see Fay v. Noia*, 372 U.S. 391, 435-38 (1963), federal courts still generally do require a state prisoner to wait until the time has expired for filing a petition for certiorari on direct review before litigating a petition for habeas corpus. *See, e.g., Raines v. New York*, 992 F. Supp. 160, 161 (N.D.N.Y. 1998); *King v. Cook*, 287 F. Supp. 269 (D. Miss. 1968); *United States ex rel. Stevens v. McCloskey*, 239 F. Supp. 419 (S.D.N.Y.), *aff'd*, 345 F.2d 305 (2d Cir. 1965), *rev'd on other grounds*, 383 U.S. 234 (1966).

[20] One of the core motivating considerations in *Griffith* was the Court's need to "resolve *all cases before us on direct review* in light of our best understanding of governing constitutional principles." *Griffith*, 479 U.S. at 323 (emphasis added) (internal quotation omitted). In *Griffith*, the Court emphasized that, "[a]s a practical matter, of course, we cannot hear each case pending on direct review and apply the new rule. But we fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final." *Id.* This Court's "GVR" practice "alleviates the 'potential for unequal treatment' that is inherent in our inability to grant plenary review of all pending cases raising similar issues," *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam) (quoting *United States v. Johnson*, 457 U.S. 537, 556 n.16 (1982)); it is a "deferential approach to state courts when the intervening event consist[s] of one of our own decisions," *id.* at 180 (Scalia, J., dissenting); and it "avoid[s] the unseemliness of holding judgments to be in error on the basis of law that did not exist when the judgments were rendered below," *id.* at 181.

petition for certiorari expires, it makes sense that the time limitation in § 2244 begins to run only after that time expires.[21]

These same concerns are not implicated by motions under § 2255, and there does not appear to be an established comparable rule (or any reason for it). As explained above, most § 2255 claims have not been litigated on direct review. In many cases, the defendant may elect not to file a petition for certiorari with regard to the claims that were raised on direct appeal, and instead may wish to proceed directly to litigate *other* claims under § 2255 before the very same district court that originally entered judgment. Here, interests of federalism and comity do not provide a reason to require the defendant to wait to file the § 2255 claim until the time expires to file a petition for certiorari on direct review. The "inter-court" dynamics at issue with regard to collateral review under § 2255 simply are inherently different from the dynamics at issue with regard to habeas corpus review under § 2254.[22]

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[21] In most cases, of course, there will be no new intervening law before the time expires to file a petition for certiorari; the state prisoner need not and might choose not to file a petition for certiorari; and the prisoner then can bring his claim after the time to file a petition for certiorari expires (and the time bar in § 2244 begins to run).

[22] However, if the defendant *does* file a petition for certiorari, it may be appropriate to defer litigation of the § 2255 claim and to arrest the running of the statute of limitations until the petition is resolved. *See* pp. 31-35, *supra*. Courts generally have held that a motion under § 2255 will not be entertained while there is an appeal pending in the Court of Appeals or this Court. *See, e.g., Feldman v. Henman*, 815 F.2d 1318, 1320-21 (9th Cir. 1987) ("A district court should not entertain a habeas corpus petition while there is an appeal *pending* in [the Court of Appeals] or in the Supreme Court." (emphasis added)); *O'Connor v. United States*, 133 F.3d 548, 550 (7th Cir. 1998) ("It makes no sense to crank up a collateral attack while a *pending* appeal may afford the prisoner the relief he seeks." (emphasis added)); *United States v. Robinson*, 8 F.3d 398, 405 (7th Cir. 1993) ("absent extraordinary circumstances, the district court should not consider § 2255

In this regard, the interpretation of the Court of Appeals allows § 2255 to operate in a manner consistent with the ordinary operation of a statute of limitations. Fundamentally, statutes of limitations commence when a cause of action accrues and a claim may be brought. *See, e.g., Zenith Radio Corp. v. Hazeltine Research Inc.*, 401 U.S. 321, 338 (1971) ("Generally, a cause of action accrues and the statute [of limitations] begins to run when a defendant commits an act that injures a plaintiff's business."). Here, the "injury" giving rise to a claim under § 2255 essentially is the (allegedly wrongful) action of the federal courts in entering and affirming a judgment of conviction. Once the Court of Appeals issued its mandate in this case, petitioner was free to return to the district court and commence the litigation of his § 2255 claims. Petitioner certainly was not *obligated* to file a petition for certiorari, and there are no reasons of comity or federalism to prohibit him from commencing litigation on his § 2255 claims once the mandate had issued. Indisputably, a principal purpose of the statute was to facilitate the prompt adjudication of such claims. *See supra* note 6; Gov't Br. at 25.

Yet, even though the judgment of the Court of Appeals was final upon the issuance of the mandate and petitioner was then free to bring his § 2255 claims, under the parties' interpretation the limitation period would not yet begin to run. This is inconsistent with the normal operation of a statute of limitations. The claim had "accrued"; it was known to petitioner; there was no obstacle to its submission. In these circumstances, the Court of Appeals properly determined that

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motions while a direct appeal is pending"); *United States v. Khoury*, 901 F.2d 975, 976 (11th Cir. 1990) (same). But, with respect to claims under § 2255, if the defendant chooses *not* to file a petition for certiorari on direct appeal, there is no reason to *require* the defendant to wait to bring the § 2255 claim until the time to file the petition for certiorari has expired.

the judgment had "become final" and the limitation period was triggered – even if that limitation period could have been arrested if petitioner actually had filed a petition for certiorari.

Ultimately, however, the critical point remains that the relevant language of § 2255 is materially different from the language of § 2244, and there is no reason to assume that Congress nevertheless meant exactly the same thing by it. Moreover, as shown below, there is nothing illogical, impractical or harmful in the consequences that follow from the interpretation of the Court of Appeals to suggest that it must be wrong.

C. The Remaining Arguments Of Impracticality Advanced By The Parties Also Do Not Favor A Different Result.

1. The parties also argue that the statute of limitations in § 2255 should not begin to run "until the law that will govern the defendant's entitlement to post-conviction relief is settled," and that this "occurs when the defendant's conviction becomes 'final' for *Teague* purposes, which . . . is when the time for seeking certiorari expires." *See* Gov't Br. at 24. As explained above, however, this is a more relevant concern with respect to petitions under § 2254 than motions under § 2255. Moreover, defendants have *one year* in which to file a § 2255 motion, which is long after any changes in the law may have occurred during the time that the defendant could have filed a petition for certiorari on direct review. In the unlikely event that the defendant filed his § 2255 motion in the brief window between the time that the Court of Appeals issued its mandate and the time expired to file a petition for certiorari, and the applicable law then changed during the remainder of that period, the defendant still would have ten months before the statute of limitations expired to amend or supplement his motion. *See, e.g., United States v. Barrett*, 178 F.3d 34, 45 (1st Cir. 1999).

2. In addition, the parties argue that the interpretation of the Court of Appeals will encourage the filing of additional and unnecessary petitions for certiorari. *See* Gov't Br. at 25 (stating that "the interpretation that treats a conviction as final when the court of appeals issues its mandate 'create[s] a strong incentive for prisoners to file plainly frivolous petitions for certiorari for the sole purpose of extending their time for habeas review'" (quoting *Kaufmann v. United States*, 282 F.3d 1336, 1338 (11th Cir. 2002))). But this concern surely is unfounded. If the defendant's purpose is simply to extend the proceedings, he will file a petition for certiorari in any event, because the actual filing will garner not only the additional sixty-nine days between the issuance of the mandate and the time in which a petition for certiorari must be filed, but also the time during which this Court considers the petition. The rule that encourages additional petitions for certiorari is the rule – which never has been considered by the Court, and is not at issue here – that the filing of a petition for certiorari *automatically* arrests the statute of limitations until the petition is *resolved*. *See id.* at 14 n.3.

3. Nor is there any reason to believe that the decision of the Court of Appeals will "lead at least some defendants to prepare their Section 2255 motions and petitions for certiorari simultaneously." *Id.* at 23. Presumably, if a defendant is *preparing* a petition for certiorari, he most likely will file it, which will extend the time for filing the § 2255 motion. Further, even if the defendant ultimately were to decide *not* to file the petition, he would still have almost ten months to prepare his § 2255 motion. Litigants face these choices all the time – in deciding, for example, whether to pursue a petition for rehearing or an appeal.

In sum, none of the arguments of impracticality advanced by the parties suggests that Congress acted illogically in enacting the two different limitation provisions that appear in

§ 2255 and § 2244. As a result, there simply is no reason to conclude that the very different words chosen by Congress should be interpreted to have the same meaning. As the parties have admitted, the most important thing is simply to have an established and uniform rule for motions filed under § 2255; the issue obviously is not whether one mechanism is better than the other. If, despite the difference in words used, Congress wishes § 2255 to have the same meaning as § 2244, Congress of course is free to change the statute.

CONCLUSION

For these reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

ERICK CORNELL CLAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 01-1500

ERICK CORNELL CLAY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The Court-appointed amicus disputes the government's submission that, when a defendant does not petition this Court for certiorari on direct appeal, his judgment of conviction becomes "final," for purposes of 28 U.S.C. 2255 para. 6(1), when the time for seeking certiorari expires. Amicus does not, however, dispute the principal proposition on which that submission is based: the term "final" has a well-settled meaning under this Court's cases dealing with collateral relief, and that meaning is identical to the one that the government, petitioner, and six courts of appeals accord the term "final" as used in Section 2255, which governs the availability of collateral relief for federal prisoners.

Under the Court's collateral review cases, a criminal judgment not reviewed by this Court becomes "final" when "the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." *Caspari* v. *Bohlen*, 510 U.S. 383, 390 (1994). The Court consistently

used that definition of finality in a series of cases involving both state and federal defendants dating back more than 30 years before the enactment of Section 2255 para. 6(1) as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214. See, *e.g.*, *Griffith* v. *Kentucky*, 479 U.S. 314, 321 n.6 (1987); *United States* v. *Johnson*, 457 U.S. 537, 542 n.8 (1982); *Linkletter* v. *Walker*, 381 U.S. 618, 622 n.5 (1965). As amicus acknowledges (Br. 28), the Court "presume[s] that Congress expects its statutes to be read in conformity with this Court's precedents." *United States* v. *Wells*, 519 U.S. 482, 495 (1997). Because Section 2255, like the Court's cases defining finality, applies in the context of collateral review of criminal convictions, there is a particularly strong reason to presume that Congress intended "final" to have the same meaning in Section 2255 para. 6(1) as in those decisions. See *Porter* v. *Nussle*, 534 U.S. 516, 527-528 (2002) (relying on cases from most closely related context to ascertain meaning of statutory term). None of the reasons advanced by amicus justifies failing to accord "final" as used in Section 2255 the term's well-established meaning in the law of collateral review.

A. The Language Of Section 2244 Does Not Justify Failing To Give "Final" As Used In Section 2255 Its Established Meaning In The Collateral Review Context

Amicus's primary argument (Br. 8-21) is that "final" as used in Section 2255 cannot be accorded its established meaning in the collateral review context because Congress failed to include in that section certain language that Congress included in 28 U.S.C. 2244, the parallel time limit provision for state prisoners seeking collateral relief under 28 U.S.C. 2254. Section 2255 provides that the time limit for filing a collateral attack runs from "the date on which the judgment of conviction becomes final," but Section 2244

states that the time limit runs from "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." Compare 28 U.S.C. 2255 para. 6(1) with 28 U.S.C. 2244(d)(1)(A). The language in Section 2244 clarifies that "final" as used in that section has its established meaning in the collateral review context. Amicus reasons by negative implication that "final" cannot have that established meaning in Section 2255 because Congress did not also include the clarifying language in Section 2255.

1. The inclusion in only Section 2244 of language clarifying the meaning of "final" is not, however, a sufficient reason to conclude that "final" necessarily means something else in other sections of the same statute. On the contrary, the "normal rule of statutory construction" is that "identical words used in different parts of the same act are intended to have the same meaning." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 570 (1995) (quoting *Department of Revenue* v. *ACF Indus., Inc.*, 510 U.S. 332, 342 (1994)). Thus, when language in one part of a statute establishes the meaning of a term used in that part of the statute, the Court generally presumes that the same definition applies to the term where it appears in other parts of the statute. See *Sorenson* v. *Secretary of the Treasury*, 475 U.S. 851, 860 (1986).

Amicus erroneously contends (Br. 13) that the presumption that a word has the same meaning throughout a statute is inapplicable here because "Congress quite clearly did not use 'identical words' in § 2244 and § 2255." Congress quite clearly *did* use the identical word "final" in both sections. The presumption that "final" has the same meaning throughout the AEDPA is not rendered inapplicable because language clarifying the meaning of "final" is not also repeated each time "final" is used. If the clarifying language had to be repeated in order for the presumption to apply, the pre-

sumption would serve no purpose, because the statute's meaning would already be clear.

Also contrary to amicus's contention (Br. 13), the presumption that "final" has the same meaning in Sections 2255 and 2244 is applicable even though the language in Section 2244 that clarifies the meaning of "final" is not written "in a definitional manner." This Court has repeatedly relied on language that clarifies a word's meaning in one part of a statute to ascertain the same word's meaning in another part of the statute even though the clarifying language is not framed as a definition. See, *e.g.*, *Gustafson*, 513 U.S. at 569 (deriving meaning of "prospectus" in Section 12 of the Securities Act of 1933, 15 U.S.C. 77j, 77*l*, from language in Section 10 that clarifies its meaning even though "§ 10 does not define what a prospectus is"); see also *Commissioner* v. *Lundy*, 516 U.S. 235, 249-250 (1996) (deriving meaning of "claim" from context of its use in one provision of Internal Revenue Code and holding that same meaning applies to term as used in another Code provision); *Sullivan* v. *Stroop*, 496 U.S. 478, 483-484 (1990) (same regarding term "child support" used in related provisions of Social Security Act).

2. In support of his contention that "final" must have a different meaning in Section 2255 than in Section 2244, amicus relies (Br. 10) on the presumption articulated in *Russello* v. *United States*, 464 U.S. 16 (1983), that, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Id.* at 23 (quoting *United States* v. *Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). Application of the *Russello* presumption would not, however, support the reading of Section 2255 advanced by amicus. Instead, application of the presumption would lead to an implausible interpretation of Section 2255 that neither amicus nor any court has endorsed, and, for that

reason, the Court should reject reliance on *Russello* in this context.

If Congress's omission in Section 2255 of the clarifying language from Section 2244 gave rise to a negative inference, the logical inference would be that "final" in Section 2255 includes *no* aspect of the omitted language. Thus, application of the *Russello* presumption to the meaning of finality under Section 2255 would entail that neither "the conclusion of direct review" nor the "expiration of the time for seeking such review" could result in finality, because both those phrases are omitted from Section 2255. Under that interpretation of Section 2255, a federal prisoner's judgment of conviction would become final without regard to direct review—*i.e.*, immediately upon the district court's entry of judgment. Neither amicus nor any court has espoused that interpretation of Section 2255, under which many federal defendants would have to seek post-conviction relief long before the conclusion of their direct appeals.

This Court has not hesitated to decline to draw an "inference * * * from congressional silence" where it would lead to such absurd results, *Burns* v. *United States*, 501 U.S. 129, 136-137 (1991), and the Court should decline to do so here. See *City of Columbus* v. *Ours Garage & Wrecker Serv., Inc.*, 122 S. Ct. 2226, 2234 (2002) (rejecting application of the *Russello* principle in part because it would lead to the implausible conclusion that States could enact, but localities could not enforce, state safety rules).

Amicus seeks to avoid taking the negative inference on which he relies to its logical—and absurd—conclusion by contending (Br. 18-20) that, under *Russello*, the use of different language in two sections of a statute implies only that the two sections mean different things, not that they cannot overlap in any way. But the only reason that the sections are presumed in *Russello* to mean different things is that one section includes particular language that is omitted in

the other. The nature and degree of the difference in meaning therefore logically depends on the nature and degree of the difference in language. Amicus's suggestion (Br. 18-19) that the Court apply the presumption to one part of the omitted language—the phrase "the expiration of the time for seeking [direct] review"—but not the other—the phrase "the conclusion of direct review"—makes no sense. If the *Russello* presumption applies to *any* of the language included in Section 2244 and omitted from Section 2255, the presumption applies to *all* of that language.

Indeed, amicus agrees (Br. 20) that a court must give full effect to any negative inference the court draws from a statutory omission when the court applies the interpretive canon of *expressio unius est exclusio alterius*. Amicus contends, however, that the *Russello* principle is distinct from that canon and (for some unexplained reason) subject to a different rule. Amicus provides no support, however, for his contention that *Russello* is distinct from the *expressio unius* canon; and, in fact, *Russello* is simply an application of that broader principle.

In *Custis* v. *United States*, 511 U.S. 485 (1994), the dissent criticized the majority's reliance on *Russello* (*id.* at 492) as an unfounded application of the *expressio unius* principle. See 511 U.S. at 501 (Souter, J., dissenting, joined by Blackmun and Stevens, JJ.). In other cases, the Court or certain Justices have likewise described *Russello*-type analysis as application of the *expressio unius* canon. For example, in *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 209 n.11 (1994), the Court described as based on *expressio unius* an argument that the inclusion of restrictions on judicial review in certain provisions of the statute implied the absence of a restriction in the provision at issue. Similarly, in *Christensen* v. *Harris County*, 529 U.S. 576, 582-583 & n.4 (2000), the Court described as an *expressio unius* argument the government's contention—which was supported by a citation to

Russello, see Br. for the U.S. as Amicus Curiae 16, *Christensen, supra* (No. 98-1167)—that the statute's specification of one instance in which an employer could control an employee's use of compensatory time created a negative implication that an employer could not otherwise control employees' use of compensatory time. Finally, in *Lindh* v. *Murphy*, 521 U.S. 320 (1997)—in which, as amicus himself notes (Br. 17), the Court used *Russello*-type reasoning—the dissent criticized the majority for relying on "one canon of statutory interpretation, *expressio unius est exclusio alterius*, to the exclusion of all others." See 521 U.S. at 337 (Rehnquist, C.J., dissenting, joined by Scalia, Kennedy, and Thomas, JJ.).[1]

3. Amicus also mistakenly argues (Br. 11) that the government's interpretation of the word "final" in Section 2255 must be rejected because it renders superfluous the language in Section 2244 that clarifies that a judgment of conviction becomes final at the "conclusion of direct review or the expiration of the time for seeking such review." 28 U.S.C. 2244(d)(1)(A). That language is not superfluous under the government's interpretation. At a minimum, the language serves to confirm the presumption that, in Section 2244 and elsewhere in the AEDPA, the finality of a judgment of conviction is determined in accordance with the standard established in this Court's collateral review cases.

Congress may have included the language for other reasons as well. As petitioner suggests (Pet. 22), Congress may have been concerned that courts would otherwise conclude that the date on which a judgment of conviction becomes final under Section 2244 depends on the definition of finality used by the State of conviction. Although amicus is

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[1] Courts of appeals have likewise recognized that the *Russello* presumption is an application of the *expressio unius* canon. See, *e.g.*, *United States* v. *Male Juvenile*, 280 F.3d 1008, 1015 (9th Cir. 2002); *Collinsgru* v. *Palmyra Bd. of Educ.*, 161 F.3d 225, 232 (3d Cir. 1998).

correct (Br. 11) that the meaning of "final" in Section 2244 is a question of federal law, that fact would not necessarily preclude adoption as the federal definition the relevant state law definition. See, *e.g.*, *De Sylva* v. *Ballentine*, 351 U.S. 570, 580 (1956); *Reconstruction Fin. Corp.* v. *Beaver County*, 328 U.S. 204, 209 (1946). In addition, Congress may have been concerned that, absent the clarifying language in Section 2244(d)(1)(A), courts might assume that the limitation period in Section 2244 begins at the same time as the limitation period in Section 2263, which applies to state prisoners serving capital sentences in States that qualify for expedited collateral review procedures. Because Section 2244 and 2263 both concern state prisoners, Congress may have determined that there was a particular risk that courts would conclude that the time limit in Section 2244 should, like the time limit in Section 2263, run from the conclusion of state court review rather than the expiration of the time to seek review in this Court. See U.S. Br. 32.[2]

B. There Is No General Rule That A Judgment Of Conviction Becomes Final When The Court Of Appeals Issues Its Mandate

Amicus contends (Br. 22-36) that there is a "broadly established" (Br. 22) rule that a judgment becomes final when the court of appeals issues its mandate on direct appeal. There is, however, no such general rule. Although a mandate-based definition of finality has been used in a few

[2] Amicus relies (Br. 20-21) on Section 2263 to support his interpretation of Section 2255 by making a negative implication argument similar to the one he makes based on Section 2244. As the government explained in its opening brief (at 30-31), the negative implication argument based on Section 2263 is unpersuasive for the same reasons that the argument based on Section 2244 is unpersuasive. The argument based on Section 2263 also fails because Section 2263 is so dissimilar in language and structure to Section 2255 that it is inappropriate to draw any inference from differences in language between the two provisions.

situations, it is only one of several alternative definitions that may apply depending on the particular context. There is no reason to conclude that Congress intended "final" to have that meaning in Section 2255 rather than the term's established meaning in the law of collateral review.

1. Contrary to amicus's suggestion, there is no one "broadly established" (Br. 22) understanding of when a judgment becomes final. Rather, differing definitions of finality apply depending on the circumstances.

a. As discussed above, in the collateral review context, a judgment not reviewed by this Court is considered final when this Court denies review or the time to petition for a writ of certiorari expires. See pp. 1-2, *supra*. In certain other situations, a judgment is considered final upon its entry by the district court. Thus, a judgment is "final" for the purpose of whether it may be reviewed on appeal when "there has been a decision by the District Court that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 798 (1989) (internal quotation marks and citations omitted). A judgment of conviction is final for that purpose "after conviction and imposition of sentence." *Ibid.* The Court has also used that definition of finality in applying the principle that the privilege against compelled self-incrimination adheres only until "the judgment of conviction has become final." *Mitchell* v. *United States*, 526 U.S. 314, 326 (1999) (equating finality of the judgment of conviction with the time at "which the sentence has been fixed").[3]

[3] In *Melkonyan* v. *Sullivan*, 501 U.S. 89, 95 (1991), the Court stated that, "[t]raditionally, a 'final judgment' is one that is final and appealable." Based on that understanding, the Court described the definition of "final judgment" in the Equal Access to Justice Act, 28 U.S.C. 2412(d)(2)(G) ("final and not appealable"), as "unusual." 501 U.S. at 95. Those statements refer to situations in which a judgment is final upon its issuance by

In still other circumstances, a judgment is considered final when the court of appeals fully resolves the appeal (even though the court has not yet issued its mandate). For example, for the purpose of seeking review from this Court, a judgment "'is final when the issues are adjudged' and settled with finality." *Scofield* v. *NLRB*, 394 U.S. 423, 427 (1969) (quoting *Market St. Ry.* v. *Railroad Comm'n*, 324 U.S. 548, 551 (1945)). "[F]inality is not deferred by the existence of a latent power in the rendering court to reopen or revise its judgment." *Market St. Ry.*, 324 U.S. at 551. Thus, even for state court judgments, which this Court may review only if they are "final" (28 U.S.C. 1257), "[t]he time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate." Sup. Ct. R. 13.3.[4]

b. In a few limited situations, some courts of appeals have ruled that the finality of a judgment occurs upon the issuance of the mandate by the court of appeals. But, contrary to amicus's contention, those decisions do not establish a general definition of finality, even "with regard to the commencement of statutes of limitations and other time bars." Amicus Br. 22.

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the district court. Because amicus does not contend that "final" has that meaning for purposes of Section 2255, his reliance (Br. 28-29, 37) on *Melkonyan* is misplaced.

[4] Amicus notes (Br. 31-35) that, when a court employs the definition of finality based on entry of judgment by the district court or the definition based on entry of the judgment by the court of appeals, finality is generally suspended by the filing of a motion for reconsideration of the judgment. Amicus further notes (Br. 31, 35) that only the actual filing of such a motion suspends the finality of the judgment. Contrary to amicus's contention (Br. 36), however, those facts have no relevance here. No one—not amicus, the parties to this case, or any court of appeals—contends that Congress employed either of those definitions of finality in Section 2255. Furthermore, a petition for a writ of certiorari is not equivalent to a motion for reconsideration.

As amicus notes (Br. 22-27), *some* courts have adopted a mandate-based definition of finality in interpreting the term "final judgment" in the prior version of Federal Rule of Criminal Procedure 33 authorizing a motion for a new trial based on newly discovered evidence and the term "final" in the Speedy Trial Act of 1974, 18 U.S.C. 3161(d)(2) and (e). One court of appeals has relied on that understanding of finality in construing Missouri's "savings" statute, which allows certain tort plaintiffs to refile dismissed claims after the statute of limitations has run. See *Glick* v. *Ballentine Produce, Inc.*, 397 F.2d 590 (8th Cir. 1968). Even in those situations, however, there is no uniformly held view that finality occurs when the court of appeals issues its mandate.[5]

Nor does a mandate-based definition of finality generally apply to other limitation provisions. For example, none of the time limits for seeking review by this Court runs from the issuance of the mandate. See p. 10, *supra*; 28 U.S.C. 2101; Sup. Ct. R. 13.3, 18.1. Similarly, although there are two other limitation periods for seeking collateral review in the AEDPA, neither of those periods runs from issuance of the mandate by the appellate court. See 28 U.S.C. 2244 (conclusion of review by this Court or expiration of time to seek review); 28 U.S.C. 2263 ("State court affirmance").

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[5] See *United States* v. *Reyes*, 49 F.3d 63, 66 (2d Cir. 1995) (noting disagreement among district courts on whether "final judgment" under former Rule 33 occurs when court of appeals enters judgment or when court issues mandate); Amicus Br. 27 n.9 (acknowledging that some courts of appeals have held that the speedy trial clock resumes not when the mandate issues but when the district court receives it); *Owens* v. *Hewell*, 474 S.E.2d 740, 741-742 (Ga. Ct. App. 1996) (limitation period under Georgia savings statute runs from entry of judgment on appeal); *Kendrick* v. *City of Eureka*, 82 Cal. App. 4th 364, 371 (2000) (federal savings statute for supplemental state claims (28 U.S.C. 1367(d)) requires plaintiffs to file their state law claims in state court within 30 days of entry by the federal court of appeals of the judgment affirming the dismissal of those claims).

2. Not only is there no established rule that a judgment becomes final when the court of appeals issues its mandate, but there also is no other reason to assume that Congress used a mandate-based definition in Section 2255. Section 2255 concerns collateral review, and none of the situations in which courts have used the mandate-based definition of finality involves that same context. Former Rule 33 provided for a motion for a new trial based on "newly discovered evidence," Fed. R. Crim. P. 33 (1997); that form of motion, unlike Section 2255, does not involve a collateral attack on the court's legal or factual rulings.[6] And the Speedy Trial Act's purpose is to promote speedy trials; it does not address policies related to collateral challenges of convictions.

The language of the Speedy Trial Act also differs in a critical respect from Section 2255 in a way that reinforces the distinction between the provisions. The Speedy Trial Act refers to the finality of the appellate action that brings about the need for the retrial. See 18 U.S.C. 3161(d)(2) (referring to when "the action occasioning the trial becomes final"); 18 U.S.C. 3161(e) (same regarding "the action occasioning the retrial"). Section 2255, in contrast, speaks of the finality of the "judgment of conviction." 28 U.S.C. 2255 para. 6(1). Likewise, the Missouri statute construed in *Glick* does not speak of the finality of judgments. See *Glick*, 397 F.2d at 591-592 (quoting Mo. Ann. Stat. § 537.100). Indeed, the portion of the Missouri statute at issue in *Glick* employs neither the word "final" nor the word "judgment." See *ibid.* As for former Rule 33, that Rule, unlike Section 2255, expressly refers to the defendant's "appeal." See Fed. R. Crim. P. 33 (1997). That reference supports defining "final judgment" for purposes of Rule 33 by reference to the

[6] A motion for new trial based on grounds other than newly discovered evidence had to be filed "within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period." Fed. R. Crim. P. 33 (1997).

finality of the appeal of right rather than the finality of direct review.

Amicus finds the Rule 33 definition of finality "noteworthy" (Br. 22-23 n.6) because, in the legislative history of an early formulation of the Section 2255 time bar, Congress indicated a desire to bring "the availability of collateral relief into closer conformity with the approach taken by Federal law in other contexts," such as Rule 33, under which there were time limits on review of federal convictions. S. Rep. No. 226, 98th Cong., 1st Sess. 10 (1983). As the government noted in its opening brief (at 22 n.6), however, Congress also indicated in that legislative history that "the time at which the judgment of conviction becomes final" (S. 1763, 98th Cong., 1st Sess. § 6, at 7 (1983)) is when "remedies on direct review are exhausted or the time for seeking direct review has expired." S. Rep. No. 226, *supra*, at 30. Thus, that legislative history refutes, rather than supports, amicus's contention that Congress intended to incorporate the mandate-based definition of finality that some courts had used under Rule 33. Instead, the legislative history indicates that Congress intended to incorporate the meaning of finality advanced by petitioner and the government. See U.S. Br. 22 n.6.

Amicus also argues (Br. 23 n.6) that a parallel interpretation of Rule 33 and Section 2255 is appropriate because a motion under Section 2255, like a motion under Rule 33, is "a further step in the defendant's *criminal* case." *Ibid.* In certain respects, a Section 2255 motion is a further step in the movant's criminal case. See 28 U.S.C. 2255 Rule 1 advisory committee's note. For example, no filing fee is required, the files from the criminal case are available to the court reviewing the motion, the Federal Rules of Criminal Procedure may govern discovery and certain other aspects of the proceeding, and a broad range of relief is available. See *ibid.* More fundamentally, however, Section 2255 is "a

remedy analogous to habeas corpus by state prisoners." 28 U.S.C. 2255 Rule 12 advisory committee's note. Thus, as this Court has explained, "a motion under § 2255, like a petition for a writ of habeas corpus, is not a proceeding in the original criminal prosecution but an independent civil suit." *Heflin* v. *United States*, 358 U.S. 415, 418 n.7 (1959) (citation omitted). See also *Andrews* v. *United States*, 373 U.S. 334, 338 (1963) ("An action under 28 U.S.C. § 2255 is a separate proceeding, independent of the original criminal case.").

That characteristic of Section 2255 has important ramifications, particularly for time limit provisions. Unlike appeals from orders denying Rule 33 motions, which are governed by the time limit for criminal appeals, "[a]ppeals from orders denying motions under Section 2255 are governed by the civil rules applicable to appeals from final judgments in habeas corpus actions." *United States* v. *Hayman*, 342 U.S. 205, 209 n.4 (1952). Thus, the time limit for filing a notice of appeal under Section 2255 is the same civil time limit that governs habeas cases. See 28 U.S.C. 2255 Rule 11 advisory committee's note. And the time limit for filing a petition for a writ of certiorari in a Section 2255 case is the same civil time limit that governs habeas cases. *Heflin*, 358 U.S. at 418 n.7. There is no reason to conclude that Congress silently departed from that practice and modeled the time limit for filing a Section 2255 motion on the time limit for filing a Rule 33 motion, rather than the time limit that governs habeas cases.

3. Because a Section 2255 motion, like an analogous petition for habeas corpus, is a form of collateral relief, the relevant definition of "final" for purposes of Section 2255 is the definition used in this Court's collateral relief cases. As described above, this Court has consistently used that definition for nearly forty years, and Congress presumably intended to incorporate that well established definition when it used the term "final" in Section 2255. See p. 1-2, *supra*.

Amicus mistakenly contends (Br. 37-40) that this well-established definition of finality is not applicable here because the Court has used that definition only when deciding whether to apply a new rule retroactively. Contrary to that contention, the Court has used the definition whenever the Court has sought to delineate when direct review ends and collateral review begins. Thus, the Court has used the same definition of finality even when the Court took the position that the retroactivity of a new rule should not turn on whether the judgment of conviction to which the rule would apply has become "final." See *Johnson* v. *New Jersey*, 384 U.S. 719, 726 (1966).

Moreover, the Court has used the same definition of finality even in cases that have not involved the retroactivity question at all. Thus, in *Barefoot* v. *Estelle*, 463 U.S. 880, 887 (1983), the Court noted that "the process of direct review * * * includes the right to petition this Court for a writ of certiorari", in the course of explaining that, when direct review has concluded, "a presumption of finality and legality attaches to the conviction" that limits the role of collateral review. In *Bell* v. *Maryland*, 378 U.S. 226 (1964), the Court addressed the common law rule that repeal of a criminal law results in dismissal of a criminal conviction if "the legislature acts before the affirmance of the conviction becomes final." *Id.* at 232. The Court noted that the rule applies to any criminal case that "has not yet reached final disposition in the highest court authorized to review it," *id.* at 230, and held that a judgment is not final for purposes of the rule when it is "on direct review in this Court." *Id.* at 232.

In fact, even amicus acknowledges (Br. 39) that the "sharp line between 'direct' and 'collateral' review" reflected in the Court's definition of finality derives from the "function" and "scope of the writ of habeas corpus." As explained above, a motion for collateral relief under Section 2255 is "analogous to habeas corpus by state prisoners." 28 U.S.C. 2255 Rule 12

advisory committee's note. In view of that fact, the Court uses the same definition of finality for federal and state prisoners. See *Griffith* v. *Kentucky*, 479 U.S. 314, 321 n.6, 328 (1987) (using single definition of "final" in resolving consolidated federal and state cases). There is no reason why Congress would have drawn a distinction where the Court has not.

C. Differences In Collateral Review Of State And Federal Convictions Do Not Support Different Definitions Of Finality In Section 2244 And 2255

1. Amicus erroneously suggests (Br. 41-46) that different definitions of finality for state and federal prisoners are justified by differences between habeas corpus and collateral relief under Section 2255. As explained above, habeas corpus and Section 2255 are fundamentally analogous remedies. In enacting Section 2255, Congress "simplified the procedure for making a collateral attack on a final judgment entered in a federal criminal case, but it did not purport to modify the basic distinction between direct review and collateral review." *United States* v. *Addonizio*, 442 U.S. 178, 184 (1979). Section "2255 was intended to mirror [habeas] in operative effect." *Davis* v. *United States*, 417 U.S. 333, 344 (1974). Although there are some minor differences between Section 2255 and habeas, amicus overstates those differences, none of which bears on the issue presented by this case.

Amicus again notes (Br. 41-42) that Section 2255 is in some respects a continuation of the criminal case and that consequently courts can provide broader relief under Section 2255 than under habeas. Amicus fails, however, to offer any reason why the broader range of relief available under Section 2255 would have led Congress to provide a shorter period within which to file a Section 2255 motion. Amicus also overlooks that Congress and this Court have consistently applied the same time limits to Section 2255 motions and habeas actions notwithstanding Section 2255's

status as a continuation of the underlying criminal case. See p. 14, *supra*. Amicus also notes (Br. 42) that habeas review allows consideration of claims that have already been reviewed by state courts, while relief under Section 2255 is generally limited to claims not raised on direct review. Once again, however, amicus does not suggest why Congress would view that difference as warranting a shorter period within which to file Section 2255 motions. To the extent that a Section 2255 movant is more likely than a habeas petitioner to be raising claims that he has not raised previously, that difference (if it were to have any impact on the time limits for filing) would seem to justify providing Section 2255 movants with more time rather than less.

Amicus also errs in contending (Br. 42-46) that "finality" has a different meaning for state and federal prisoners. This Court has held repeatedly that "the interest in finality is the same with regard to both federal and state prisoners." *Francis* v. *Henderson*, 425 U.S. 536, 542 (1976) (quoting *Kaufman* v. *United States*, 394 U.S. 217, 228 (1969)). Therefore, just as the Court has applied the same definition of finality to state and to federal prisoners, it has consistently applied the *Teague* doctrine and other rules governing collateral relief equally to both federal and state prisoners, notwithstanding the absence of federalism and comity concerns in the federal context. See *Bousley* v. *United States*, 523 U.S. 614 (1998) (applying *Teague* principles to Section 2255 motion); *Reed* v. *Farley*, 512 U.S. 339, 353-355 (1994) (scope of cognizable statutory claims is the same for state and federal prisoners); *United States* v. *Frady*, 456 U.S. 152, 167-168 (1982) (cause and prejudice standard applies equally to state and federal prisoners); *Davis*, 417 U.S. at 344 ("grounds for relief under § 2255 are equivalent to those encompassed by § 2254").

Relying on three district court decisions (Amicus Br. 43 n.19), amicus incorrectly asserts (Br. 42) that a state

prisoner cannot file a habeas petition until the time has expired for the prisoner to file a petition for certiorari on direct review. Although a state prisoner was at one time required to petition for certiorari in his direct appeal in order to exhaust his state remedies, see *Darr* v. *Burford*, 339 U.S. 200, 207 (1950), that is no longer the law. See *Fay* v. *Noia*, 372 U.S. 391, 435-438 (1963). This Court has described *Fay* as "reject[ing]" the "argument that habeas corpus review was unavailable in advance of a petition for certiorari." *County Court* v. *Allen*, 442 U.S. 140, 149 n.7 (1979). In *Allen*, the Court also cited *Stevens* v. *Marks*, 383 U.S. 234 (1966), noting that, in that case, "the Court entertained a challenge to a state statute in a federal habeas corpus proceeding even though the defendant had not pursued that challenge on appeal to this Court prior to filing his petition for habeas corpus." 442 U.S. at 149 n.7.

The district court's decision in *Stevens* is one of the three district court rulings on which amicus relies. But the district court in *Stevens* actually held that "a state prisoner may, in an appropriate case, seek relief in the district court by way of habeas corpus, notwithstanding that direct review in the Supreme Court is still open to him." *United States ex rel. Stevens* v. *McCloskey*, 239 F. Supp. 419, 422 (S.D.N.Y.), aff'd on other grounds, 345 F.2d 305 (2d Cir. 1965), rev'd, 383 U.S. 234 (1966). In any event, as the Court recognized in *Allen*, this Court's review of the merits of the habeas petition in *Stevens* demonstrates that, contrary to amicus's assertion, a state prisoner is not barred from seeking habeas relief before the time expires within which he could seek certiorari in his direct appeal. See also, *e.g.*, *Hedberg* v. *Pitchess*, 362 F.2d 511 (9th Cir. 1966) (reversing dismissal of habeas petition on ground that time for certiorari on direct review had not expired). There is therefore no difference in the time at

which state and federal prisoners can first seek collateral relief.[7]

2. The absence of any reason why Congress would have imposed different time limits on state and federal prisoners reinforces the conclusion, based on the established definition of finality in the collateral review context and the text of the AEDPA, that a judgment of conviction becomes final for purposes of Sections 2244 and 2255 at the same time—the conclusion of direct review by this Court or the expiration of the time for seeking such review. As explained in the government's opening brief (at 22-26), that rule also advances the orderly administration of justice.

The period for commencing a collateral attack should not start to run until the law that will govern the defendant's entitlement to post-conviction relief is settled, and, under *Teague* v. *Lane*, 489 U.S. 288 (1989), that occurs only when the time for seeking certiorari on direct appeal has expired. Amicus's alternative proposal (Br. 46)—that federal defendants amend their Section 2255 motions to account for subsequent changes in the law—is inefficient. There is no reason to believe that Congress intended for collateral review to proceed in that piecemeal fashion.

Moreover, although amicus points out (Br. 47) that, even under the government's reading of Section 2255, some prisoners may file frivolous petitions for certiorari on direct review in order to prolong the time within which to seek collateral relief, the rule proposed by amicus would provide an even greater incentive for prisoners to adopt that tactic.

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[7] The other district court decisions on which amicus relies held that the petitioners had failed to exhaust state remedies. See *Raines* v. *New York*, 992 F. Supp. 160 (N.D.N.Y. 1998); *King* v. *Cook*, 287 F. Supp. 269 (N.D. Miss. 1968). *Allen* makes clear, however, that the possibility of review by this Court is not a state remedy that must be exhausted. See 442 U.S. at 149-150 n.7.

U.S. Br. 25-26. There is no cause to provide any additional incentive (no matter how slight) for frivolous filings.

* * * * *

For the foregoing reasons, and those stated in our opening brief, the judgment of the court of appeals should be vacated and the case remanded to that court for further proceedings.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

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No. 01-1500

IN THE

Supreme Court of the United States

Erick Cornell Clay,

Petitioner,

v.

United States of America,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Petitioner's opening brief and the opening brief of the United States demonstrated that the one-year statute of limitations to file a motion under 28 U.S.C. 2255 runs from the conclusion of direct review or the expiration of time to seek such review. That interpretation, which has been adopted by the clear majority of circuits, comports with the parallel terms of 28 U.S.C. 2244 as well as the definition of "final" employed by this Court in the collateral review context. *Amicus* offers basically two arguments in response, both of which are flawed.

First, *Amicus* points to other contexts (principally Fed. R. Crim. P. 33 and the Speedy Trial Act) in which "final" has a different meaning. The simple answer, however, is that Section 2244 and this Court's collateral review precedents provide much closer analogies to Section 2255 than do the alternative contexts *Amicus* identifies. Moreover, *Amicus*'s interpretation conflicts with the view of every circuit to address the issue, for it would mean that the time to seek post-conviction review under Section 2255 runs from the issuance of the appellate mandate even when the defendant does seek certiorari on direct review.

Second, *Amicus* argues that the majority "reading of § 2255 and § 2244 is impossible" (*Amicus* Br. 4) and "would have the Court amend" the statute (*id.* at 8) in light of the so-called "*Russello* presumption." But that tool of construction is inapposite when, as here, a particular term appears in multiple provisions but is defined in only one. Instead, the provisions should be read *in pari materia* absent a contrary indication of congressional intent, which does not exist in this case. *Amicus* cites without any substantial discussion nine cases applying the *Russello* presumption; each is inapposite.

I. The Logical Sources For Interpreting The Term "Final" In Section 2255 Are Section 2244 And This Court's Collateral Review Precedents.

1. The limitation period that Congress set forth in Section 2244 for state prisoner habeas petitions under 28 U.S.C. 2254 is

more analogous – indeed, on any fair reading, *much* more analogous – than the examples offered by *Amicus* in which the courts have given "final" a different meaning. Petitioner's opening brief showed that Congress intended applications for post-conviction relief under Sections 2254 and 2255 generally to operate similarly. See Pet. Br. 3 (citing *Hill* v. *United States*, 368 U.S. 424 (1962)). It is settled that "§ 2255 was intended to afford federal prisoners a remedy identical in scope to federal habeas corpus," such that "there can be no doubt that the grounds for relief under § 2255 are equivalent to those encompassed by § 2254" and "§ 2255 was intended to mirror § 2254 in operative effect." *Davis* v. *United States*, 417 U.S. 333, 343-45 (1974).

Congress furthermore in the AEDPA formulated the one-year limitation periods of those provisions in almost identical terms. *Amicus* agrees that the provisions are "otherwise analogous (and virtually identical)." *Amicus* Br. 4. "For the most part, § 2244's one-year limitation period closely parallels the period set forth in § 2255. Each provision describes four possible dates and provides that the limitation period shall run from the latest of those dates. The provisions' descriptions of three of those four dates * * * are virtually identical * * *." *Id.* at 9.

Congress straightforwardly distinguished direct and collateral review in Section 2244. Consistent with this Court's precedents, Congress adopted a rule under which the deadline to bring a collateral attack commences when proceedings conclude in this Court on direct review or the time to seek certiorari expires. See Pet. Br. 14-16 (collecting cases); S.G. Open. Br. 16-19 (collecting cases); see also *Brecht* v. *Abrahamson*, 507 U.S. 619, 634 (1993); *Bradley* v. *School Bd. of Richmond*, 416 U.S. 696, 711 n.14 (1974). When that period expires, the judgment cannot be overturned on direct review and it has become "final" in the sense of "allowing no further doubt or dispute" (THE NEW OXFORD AMERICAN DICTIONARY 633 (2001)). It makes no difference that these precedents were "derive[d] from 'basic norms of constitutional adjudication'" (*Amicus* Br. 6 (quoting *Griffith* v. *Kentucky*, 479 U.S. 314, 322 (1987))) because this Court has consistently applied the same rule – under which the time to seek certiorari is counted in determining finality – whenever it

distinguishes direct from collateral review. Contrary to *Amicus*'s contention, these precedents are not limited to the retroactivity context but stand for the general proposition that, "[w]hen the process of direct review – which, if a federal question is involved, includes the right to petition this Court for a writ of certiorari – comes to an end, a presumption of finality and legality attaches to the conviction and sentence." *Barefoot* v. *Estelle*, 463 U.S. 880, 887 (1983).

Furthermore, absent some contrary indication in the text or legislative history, it is logical to conclude that Congress intended "final" to have the same meaning in Section 2255 as in Section 2244 and this Court's collateral review precedents. A single, uniform interpretation of the term has the considerable advantage of clarity, which is a cherished commodity in modern post-conviction litigation, particularly given that many applications are filed *pro se*. "[T]he most important thing is simply to have an established and uniform rule * * *." *Amicus* Br. 48. Yet on *Amicus*'s view, a federal prisoner is expected to know and appreciate that his judgment of conviction does *not* "become final" for purposes of the retroactive application of this Court's precedents until the time to seek certiorari expires, yet it *does* "become final" for purposes of the filing of his Section 2255 motion upon the issuance of the appellate mandate.

Amicus may be correct that "there are reasons why Congress would treat *claims* under § 2255 and § 2254 (to which § 2244 relates) differently" in some respects. *Amicus* Br. 41 (emphasis omitted; second emphasis added). The relevant point, however, is that this possibly differential treatment of "claims" is unrelated to the running of the statute of limitations. *Amicus* thus has no theory for why Congress would give state habeas petitioners who do not seek certiorari the full benefit of the time to seek review in this Court, but would apply a different rule for federal prisoners. Whether or not "courts considering § 2255 motions can provide a broader range of relief" and "a federal prisoner generally may only raise claims in a § 2255 motion that were *not* already considered on direct appeal" (*Amicus* Br. 42), those points simply have nothing to do with the time for filing post-conviction applications in federal district court.

Nor is *Amicus* correct that "a state prisoner may not seek a writ of habeas corpus from a federal court until the time has expired for the state prisoner to file a petition for certiorari on direct review," or that such a practice (to the extent it exists) is "not implicated by motions under § 2255." Contra *Amicus* Br. 42, 44. According to *Amicus*, when a federal prisoner decides not to seek certiorari and instead "to proceed directly to litigate other claims under § 2255 before the very same district court that originally entered judgment," "interests of federalism and comity do not provide a reason to require the defendant to wait to file the § 2255 claim until the time expires to file a petition for certiorari on direct review." *Id.* at 44 (emphasis omitted). But that is equally true under Section 2254, and it therefore provides no basis for concluding that Congress intended a different limitation period here: if a state prisoner does not seek certiorari in this Court, "federalism and comity" do not counsel in favor of adding to the one-year limitation period the period of time during which the prisoner could have sought review here.[1]

The bottom line, then, is that the obvious place to look for the meaning of the phrase "judgment of conviction becomes final" in Section 2255 is the indistinguishable limitation provision of Section 2244. The few examples that *Amicus* offers of instances in which courts have given "final" a different interpretation are thus largely immaterial. *Amicus* does not contend that any of them provide a better analogy than Section 2244 and, as petitioner shows *infra*, each is properly distinguished.

2. Before addressing the instances *Amicus* identifies in which "final" has been given a different meaning, it is important to recognize the consequence each of those examples has in common. According to *Amicus*, the period to file a motion un-

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[1] In any event, *Amicus*'s assertion that, notwithstanding *Fay* v. *Noia*, 372 U.S. 391 (1963), "federal courts still generally do require a state prisoner to wait until the time has expired for filing a petition for certiorari on direct review before litigating a petition for habeas corpus" (*Amicus* Br. 43) reflects at most a sensible, pragmatic view that collateral review should await the conclusion of direct review. The same rationale applies under Section 2255.

der Section 2255 is *not* tolled when, in contrast to this case, a defendant *does* seek certiorari in this Court. Refusing to commence the limitation period upon issuance of the appellate mandate, he explains, is "contrary to the established interpretation of analogous provisions of Rule 33 and the Speedy Trial Act." *Amicus* Br. 7. *Amicus* has thus set himself at odds with every court of appeals to have considered the issue, all of which rightly hold that the one-year period does not begin until the denial of certiorari because Congress could not have intended to require federal prisoners to commence Section 2255 proceedings while it is uncertain whether their convictions even stand. See Pet. Br. 12; S.G. Open. Br. 14 & n.3.[2]

Amicus notes that, "traditionally, a 'final judgment' is one that is final and appealable." *Amicus* Br. 28-29 (quoting *Melkonyan* v. *Sullivan*, 501 U.S. 89, 95 (1991)). But the statute of limitations under Section 2255 does not run from the entry of a "final judgment" (which is an established term of art) and there is nothing "unusual" (contra *id.* (quoting *Melkonyan*, 501 U.S. at 95)) or "*atypical*" (contra *id.* at 41 (emphasis in original)) about the conclusion that a judgment of conviction "becomes final" (§ 2255 para. 6(1)) once there no longer is a prospect it will be overturned on appeal. To the contrary, even *Amicus* presumes that the limitation period of Section 2255 does not begin to run when a district court enters a "final judgment" in the traditional sense, for he agrees that the limitation period does not com-

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[2] *Amicus* does offer that it might be possible to regard the limitation period as "tolled" while a certiorari petition is pending. But he candidly acknowledges that this suggestion is deeply problematic. Congress provided for tolling under the expedited procedures of 28 U.S.C. 2263 (see § 2263(b)); if the *Russello* presumption applies in this context, then it logically applies to preclude the availability of tolling as well. See *Amicus* Br. 21. Further, the requests for relief that toll a judgment's finality (such as motions for reconsideration) are "filed in the court that rendered the judgment" (*id.* at 34) in contrast to, for example, a certiorari petition in this Court. Indeed, the very point of those cases is that such a request precludes the judgment from becoming final and thus appealable.

mence until review of that judgment has concluded on appeal. Otherwise, the limitation period would run during the pendency of an appeal as of right, despite the uniform view acknowledged by *Amicus* (at 44-45 n.22) that a Section 2255 motion may not be filed at that time. See also S.G. Open. Br. 22 & n.7. Sections 2244 and 2255 thus necessarily use the term "judgment" as itself encompassing "[a] court's *final* determination of the rights and obligations of the parties in a case" (BLACK'S LAW DICTIONARY 846 (7th ed. 1999) (emphasis added)).

Despite the fact that Section 2255 does not refer to a "final judgment," *Amicus* also places considerable weight on Federal Rule of Criminal Procedure 33, which required, prior to its amendment in 1998, that any motion for a new trial based on newly discovered evidence be filed "before or within two years after *final* judgment." Fed. R. Crim. P. 33 (pre-Dec. 1, 1998 version) (emphasis added). In interpreting this provision, the courts of appeals have given the additional meaning of "judgment" (*i.e.*, the entry of the district court's judgment), reading instead to mean the Rule's entry of the appellate judgment's entry date. See *Amicus* Br. 22-23.

Even assuming that the courts of appeals correctly interpreted Rule 33 (a question that has never reached), *Amicus*'s reliance on it is misplaced. As explained, there is an important conceptual difference between the entry of a final judgment and the date on which a judgment "becomes final." Further, the policy consideration animating the strict limitation period of Rule 33 – that the evidence underlying the conviction not become stale prior to a new trial (see *Bean* v. *United States*, 679 F.2d 681, 685 (CA7 1982)) – is not central under Section 2255. It is therefore not surprising that Rule 33's period is jurisdictional (see, *e.g.*, *United States* v. *Fowler*, 256 F.3d 741, 743 (CA5 2001) (per curiam)), while the Section 2255 period is subject to equitable tolling (*Amicus* Br. 35-36 n.16 (citing cases)).[3]

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[3] *Amicus*'s assertion that Rule 33 reflects a settled interpretation of "final judgment" because "[c]ourts uniformly held that [the Rule's] time was triggered when the Court of Appeals issued its mandate of affirmance" (Br. 22-23) is belied by the Advisory Committee Notes to the Rule's 1998 amendment, which explain that the amendment was adopted in part because it was unclear whether the bar was triggered by "the appellate court's judgment or the issuance of its mandate." Fed. R. Crim. P. 33 Adv. Comm. Notes.

Amicus's further assertion that "Congress indicated that it sought to enact a statute of limitations under § 2255 that would be comparable to the time bar that existed under [the pre-Amendment] version of Rule 33" (Br. 22 n.6), seriously overstates a 1983 report stating that the addition of a statute of limitations to Section 2255 would "bring[] the availability of collateral relief into conformity with the approach taken by federal courts" (S. Rep. No. 98-226, at 9-10 (1983)). The report's statement that the limitation period "runs when all time remedies on direct review are exhausted or the time for seeking direct review has expired" (*id.* 30). See S.G. Open. Br. 22 n.6.

Amicus also points to the Speedy Trial Act, which provides that the time to subject a defendant to trial or retrial "shall commence within seventy days from the date the action occasioning the trial [or retrial] becomes final." 18 U.S.C. 3161(d)(2), 3161(e). *Amicus* notes the rule that "an *appellate disposition* occasioning a retrial becomes final on the date when the appellate court issues its mandate." *United States* v. *Kington*, 875 F.2d 1091, 1109 (CA5 1989), *quoted in Amicus* Br. 26 (emphasis added; emphasis omitted). Thus, when a court of appeals' decision subject to the Act requires the retrial of a criminal defendant, the statute expressly provides that the limitation period runs from the appellate ruling, which is the "action occasioning the trial [or retrial]."[4]

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[4] The distinction between the "court of appeals' judgment" and the "judgment of conviction" also explains why *Amicus* is wrong to emphasize that, "under the most natural understanding of the words, the judgment *of the Court of Appeals* affirming petitioner's conviction" is the "final judgment" for purposes of the time

Once again, the text and policies of Section 2255 are different. An appellate court's judgment *overturning* a conviction (the scenario to which *Amicus* refers under the Speedy Trial Act) cannot on any reading be regarded as a "judgment of conviction" (the language of Section 2255). The Speedy Trial Act must look to the appellate mandate because, "[s]imply put, jurisdiction follows the mandate" and the retrial cannot commence until the case returns to the district court. *United States* v. *Rivera*, 844 F.2d 916, 921 (CA2 1988), *cited in Amicus* Br. 26.[5] Finally, the shorter time period under the Speedy Trial Act exists for the benefit of the defendant, not the government, which otherwise would have the opportunity to delay the retrial by seeking certiorari to review the appellate court's judgment overturning the conviction. Courts accordingly hold that it is not "necessary for *the government*'s time to petition for certiorari to expire." *Amicus* Br. 27 (emphasis added).

II. This Case Is Controlled By The Canon That Statutory Terms Should Be Read *In Pari Materia* Rather Than By The *Russello* Presumption.

1. Given the clear parallels between the limitation provisions of Sections 2244 and 2255, the controlling principle of statutory construction in this case is that a "term should be construed, if possible, to give it a consistent meaning throughout the Act. That principle follows from our duty to construe statutes, not isolated provisions." *Gustafson* v. *Alloyd Co.*, 513 U.S. 561, 568 (1995). "The burden" is on "the proponents of the view that [a term] means one thing in [one provision] and another in [a later provision] to adduce strong textual support for that conclusion." *Id.* at 573. The force of the *in pari materia* canon is at its

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Amicus Br. 31 (first emphasis added). See also *id.* at 35. The finality of the appellate judgment is irrelevant to Section 2255.

[5] For this reason, some courts looked to the receipt of the mandate by the district court rather than its issuance by the court of appeals (see *Amicus* Br. 27 n.9), a divergence in authority that belies *Amicus*'s assertion that "final" has a single, generally accepted meaning.

strongest when, as in this case, two statutes are enacted simultaneously. See Pet. Br. 20; S.G. Open. Br. 20 (collecting cases).

Burnet v. *Guggenheim*, 288 U.S. 280 (1933), is instructive. *Burnet* held that a tax on "the transfer * * * by gift * * * of any property" was triggered, in the context of a trust, at the time the trust became irrevocable rather than the earlier date on which the trust was established. The gift tax statute did not define "transfer * * * of any property," so the Court looked to the parallel provisions of the estate tax, which were triggered by any revocable trust – *viz.*, any trust "where the enjoyment thereof was subject * * * to any change through the exercise of a power [by the decedent] * * * to alter, amend, or revoke." The Court specifically rejected the taxpayer's argument that the absence of a parallel provision in the gift tax gave rise to the negative inference that Congress did not intend to tax revocable trusts in that context:

> [The respondent] asks why * * * a provision should have been placed in [the estate tax] and nothing equivalent inserted in [the gift tax], if powers for purposes of the one tax were to be treated in the same way as powers for the purposes of the other. * * * No doubt the draftsman of the statute would have done well if he had been equally explicit in the drafting of [the gift tax]. This is not to say that meaning has been lost because extraordinary foresight would have served to make it clearer. Here as so often there is a choice between uncertainties. We must be content to choose the lesser.

Id. at 287-88. See also *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 42-44 (1939) (same); cf. *Allied Chem. & Alkali Workers* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 185 (1971) (construing definitions of duty to bargain collectively *in pari materia*).

2. This case is not controlled, as *Amicus* contends, by the so-called "*Russello* presumption," under which courts give effect to Congress's use of distinct language in two related or parallel statutory provisions. The text simply does not give rise to a negative inference that Congress intended to preclude Section 2255 from being interpreted in light of the meaning of "final"

codified in Section 2244. As *Amicus* explains (at 13), "Section 2255 refers to the moment when a federal prisoner's conviction 'becomes final,' and elaborates no further * * *." No meaningful negative inference arises from the fact that Congress did not define "final" *at all* in Section 2255 but did provide a definition in Section 2244.

The *Russello* presumption might apply if, for example, Congress had defined final in Section 2255 in a more limited fashion than in Section 2244. For example, imagine that the limitation period in Section 2255 ran from the date the "judgment becomes final by the conclusion of direct review." In that hypothetical circumstance, a habeas petitioner would have difficulty arguing that "the conclusion of direct review" included the time to seek certiorari in this Court. The petitioner's argument would be textually plausible, but it would be in considerable tension with Section 2244, which expressly distinguishes "the conclusion of direct review" from "the expiration of the time for seeking such review."

But anything less than such a clear contrast does not give rise to the *Russello* presumption in the context of these provisions of the AEDPA. As *Amicus* explains (at 15), *Russello* rests on the "presumption that Congress does act carefully and thoughtfully when it drafts statutes." But technical and refined contrasts between Sections 2244 and 2255 should not be read to give rise to negative inferences. The limitation period of Section 2255, for example, is measured from the time the "judgment of conviction" "becomes" final; Section 2244, by contrast, runs from the time the "judgment" "became" final. Untempered application of *Russello* would require attributing significance to both of these distinctions, an implausible result.

There are other examples as well. Petitioner's opening brief (at 23) identified, and *Amicus* simply ignores, instances in which Section 2255 implicitly cross-references and incorporates the provisions of Section 2244. For example, Section 2255 does not even expressly prohibit federal prisoners from filing second or successive applications, which are precluded only by incorporation of Section 2244(b)(1). Further, Section 2255 para. 8(1)'s discussion of newly discovered evidence impliedly incorporates

the more stringent provision of Section 2244(b)(2)(B)(i) that "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence." Accepting *Amicus*'s argument, by contrast, would require drawing negative inferences from the failure of Congress to include all the terms of Section 2244 in Section 2255.

If anything, this case presents a particularly inappropriate circumstance to draw the *Russello* presumption, for there is a perfectly plausible explanation for Congress's decision to include a definition of "final" in Section 2244 but not in Section 2255. Thus, even if the *Russello* presumption otherwise applied, it would be overcome in this case, particularly given the logical parallel between the limitation provisions of Sections 2244 and 2255. The limitation period of Section 2244 is triggered by state court proceedings, which are governed by varying conceptions of "finality." See Pet. Br. 22. Cf. *Duncan* v. *Walker*, 533 U.S. 167, 177 (2001) (recognizing that Congress may have used the term "post-conviction or other collateral" "in recognition of the diverse terminology that different States employ to represent the different forms of collateral review that are available after a conviction"). *Amicus* suggests (at 11) that a federal definition of "final" would be applied in any event. But the suggestion that there is an immutable principle that federal law controls – such that it was entirely unnecessary to include a definition even in Section 2244 – is incorrect, for there are many instances in which "federal courts should 'incorporate state law as the federal rule of decision.'" *Kamen* v. *Kemper Fin. Servs.*, 500 U.S. 90, 98 (1991) (quoting *United States* v. *Kimbell Foods*, 440 U.S. 715, 728 (1979)). Thus, although *Amicus* (at 11-12) cites *Dickerson* v. *New Banner Institute*, 460 U.S. 103 (1983), for the proposition that federal law determines the meaning of "conviction" for purposes of federal firearms statutes, he fails to recognize that Congress specifically overturned that holding in 18 U.S.C. 921(a)(20), which looks to state law. See *Caron* v. *United States*, 524 U.S. 308, 312-13 (1998).

Furthermore, application of the *Russello* presumption in this case would produce a result that not even *Amicus* defends: it would require construing "final" in Section 2255 to exclude *both*

of the two periods identified in Section 2244: "the conclusion of direct review or the expiration of time for seeking such review." Without elaboration, *Amicus* contends that "it would have made no sense for Congress to have written the statute to say that the limitation period in § 2244 runs from 'the date on which the judgment became final or the expiration of time for seeking direct review.'" *Amicus* Br. 5. But why is that so? If *Amicus* were correct that the first clause – "the judgment became final" – means "the issuance of the mandate," the formulation that he characterizes as nonsensical would identify two different points in time and would thus be perfectly plausible. Moreover, that formulation in Section 2244 would be a substantially stronger candidate for the application of the *Russello* presumption to Section 2255, which refers more narrowly to the date on which the judgment of conviction "becomes final."

Alternatively, *Amicus* would reformulate the presumption so that "mutual exclusivity is not in any way a precondition of *Russello*; rather, the difference between the language of the provisions reflects a *difference* in scope – the two provisions cannot have exactly the same meaning." *Amicus* Br. 20. Even accepting that view, *Amicus* simply assumes his own conclusion. He posits that Congress implicitly intended to incorporate one of the two phrases in Section 2244 – "the conclusion of direct review or the expiration of time for seeking such review" – and further assumes that it was the former rather than the latter. But, given this Court's decisions interpreting "final" in the collateral review context, it is equally plausible that Congress intended to incorporate the *latter* phrase and to defer the commencement of the limitation period for filing a collateral attack until direct review is completed.

3. It is therefore not surprising that each of the nine precedents *Amicus* cites without discussion is inapposite. None involves the application of the *Russello* presumption in the circumstances of this case: Congress's simultaneous enactment of two provisions with a common phrase, only one of which contains a definition. Furthermore, this Court has never, as *Amicus* proposes in this case, used the *Russello* presumption as its sole source of statutory interpretation. Each time the presumption

has been applied, it has supplemented other indicia of Congress's intent.

***Russello* v. *United States*, 464 U.S. 16 (1983)**, itself held that a forfeitable "interest" under RICO includes insurance proceeds secured by fraud. The relevant statute provided for forfeiture of "any *interest* [the petitioner] has acquired or maintained in violation of [RICO]." 18 U.S.C. 1963(a)(1) (emphasis added). This Court reasoned principally that "[t]he ordinary meaning of 'interest' surely encompasses a right to profits or proceeds," because that term is generally defined as "[t]he most general term that can be employed to denote a right, claim, title, or legal share in something." 464 U.S. at 21 (quoting BLACK'S LAW DICTIONARY 729 (5th ed. 1979)). The statute's legislative history, moreover, reflected a congressional intent to give RICO's forfeiture provision a wide scope. *Id.* at 26-28.

The Court specifically rejected the petitioner's argument that "interest" must mean "an interest in" some identifiable thing, and "an interest in an 'enterprise'" in particular. 464 U.S. at 22. The Court reasoned: "Every property interest, including a right to profits or proceeds, may be described as an interest in something." *Id.* The petitioner's argument was furthermore contradicted by the "evolution" of the statute, which as originally drafted referred to "all interest in the enterprise," but which was later amended to remove this limitation. *Id.* at 23-24.

In the portion of the opinion that has been cited for the "*Russello* presumption," the Court found its conclusion "that the language of the statute plainly covers the insurance proceeds petitioner received as a result of" his fraud to be "fortified" by the contrast between the provision at issue, Section 1963(a)(1), and Section 1963(a)(2). 464 U.S. at 23. The latter provision did not "define" the term "interest," but rather used the very terminology – interest in an enterprise – that the petitioner sought to invoke. "The former speaks broadly of 'any interest * * * acquired,' while the latter reaches only 'any interest in * * * any enterprise which [the defendant] has established[,] operated, controlled, conducted, or participated in the conduct of, in violation of [RICO].'" *Id.* (first and second alterations in original). "Had Congress intended to restrict § 1963(a)(1) to an interest in

an enterprise, it presumably would have done so expressly as it did in the immediately following subsection (a)(2)." *Id.*

***Barnhart* v. *Sigmon Coal Co.*, 534 U.S. 438 (2002)**, held that the respondent coal companies did not owe health benefits to retired miners who had worked for the companies' predecessors. The respondents were successors in interest to "signatory operators" – companies that had signed any one of a series of agreements requiring contributions to provide benefits to retired coal miners. The Coal Industry Retiree Health Benefit Act of 1992 (Coal Act), 26 U.S.C. 9701 *et seq.*, required a company to pay for a retiree's health benefits if the company was either a "signatory operator" or – if the "signatory operator" was no longer in business – a "related person" to a signatory operator. 26 U.S.C. 9706(a). Under the Coal Act, "'a person shall be considered to be a related person to a signatory operator if that person' falls within one of three categories." 534 U.S. at 451 (quoting 26 U.S.C. 9701(c)(2)). The Court reasoned that because the respondent company did "not fall within any of the three specified categories defining a 'related person,'" it was not liable to pay health benefits under the Coal Act. *Id.* at 452.

After relying on the text's plain meaning, the Court added: "Nor should we infer" that Congress meant the three categories to cover the company in question, because "[w]here Congress wanted to provide for successor liability in the Coal Act, it did so explicitly, as demonstrated by other sections in the Act that give the option of attaching liability to 'successors' and 'successors in interest.'" 534 U.S. at 452-53. Citing a statute providing "that '*for the purposes of* [*Individual Employer Plans*]' * * * 'the term "last signatory operator" shall include a successor in interest of such operator,'" the Court explained, "Congress gave 'last signatory operator' a *subsection-specific definition* that extends the IEP obligations of a preenactment signatory operator to include its 'successors in interest.'" *Id.* at 453 (quoting 26 U.S.C. 9711(g)(1)) (emphasis added). The Court reasoned: "Those subsections stand in direct contrast to the provisions implicated here: §§ 9701(c)(1), (2), and (4) *which define* 'signatory operator,' 'related persons,' and 'last signatory operator,' respectively, '*for [the] purposes of this section*,' and *do not* specify that they include or impose liability on the signatory operator's successor in interest." *Id.* at 453-54 (first two emphases added).

***Beach* v. *Ocwen Federal Bank*, 523 U.S. 410 (1998)**, held that the Truth in Lending Act extinguishes the defense of rescission in foreclosure actions three years after the consummation of the transaction. The petitioners claimed that their bank, which was trying to foreclose on their house, had unlawfully concealed information from them, and they sought to defend against the foreclosure by claiming a right to rescind the mortgage agreement on the ground that the bank had failed to make disclosures required by the Act. The bank argued that the Act prohibited all claims for rescission made more than three years after the transaction, whereas the petitioners argued that a *defense* of rescission was not barred. The Act states that "the borrower's right of rescission 'shall expire three years after the date of consummation of the transaction.'" 523 U.S. at 413 (quoting 15 U.S.C. 1635(f)). Noting that "the answer is apparent from the plain language of § 1635(f)," this Court concluded that the section "talks not of a suit's commencement but of a right's duration, which it addresses in terms so straightforward as to render any limitation on the time for seeking a remedy superfluous." *Id.* at 416-17.

Only then did the Court go on to contrast with Section 1635(f) another section of the Act: "The Act, however, has left even less to chance (if that is possible) than its 'expire' provision would allow, standing alone." 523 U.S. at 417. Section 1640 authorizes borrowers to bring an action for recoupment of mortgage payments within one year of the transaction. It provides "that the 1-year limit on actions for damages 'does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment.'" *Id.* at 417-18 (quoting 15 U.S.C. 1640(e)). Section 1640 does not define a term in Section 1635. "The quite different treatment of rescission stands in stark contrast to [the treatment of recoupment in Section 1640(e)], there being no provision for rescission as a defense that would mitigate the un-

compromising provision of § 1635(f) that the borrower's right 'shall expire' with the running of the time." *Id.* at 418.

***Bates* v. *United States*, 522 U.S. 23 (1997),** held that a statute prohibiting the misapplication of federally insured student loan funds did not require a specific intent to injure or defraud someone. The statute at issue applies to "[a]ny person who knowingly and willfully embezzles, misapplies, steals, or obtains by fraud, false statement, or forgery any funds, assets, or property provided or insured under this subchapter." 20 U.S.C. 1097(a). The court reasoned: "The text of § 1097(a) does not include an 'intent to defraud' state of mind requirement, and we ordinarily resist reading words or elements into a statute that do not appear on its face." 522 U.S. at 29.

The Court went on to explain: "In contrast, 20 U.S.C. § 1097(d), enacted at the same time as § 1097(a), makes it a felony 'knowingly and willfully' to 'destroy or conceal any record relating to the provision of assistance under [Title IV] *with intent to defraud the United States*.'" *Id.* (emphasis and alteration in original). Section 1097(d) did not define a term appearing in Section 1097(a), but rather included an independent element missing from the other section.

***United States* v. *Gonzales*, 520 U.S. 1 (1997),** held that a federal criminal sentence for carrying a firearm could not run concurrently with any other sentence, including one for a state crime. The statute provided that anyone carrying a firearm while committing "any * * * drug trafficking crime * * * for which he may be *prosecuted in a court of the United States*" shall be sentenced to five years imprisonment, and that those five years shall not "run concurrently with *any other term of imprisonment*." 18 U.S.C. 924(c)(1) (emphasis added). The Court held that the phrase "any other term of imprisonment" referred to imprisonment in state as well as federal courts, basing its holding on the ordinary meaning of the word "any": Because "the word 'any' has an expansive meaning," it must be read to refer "to all 'terms of imprisonment,' including those imposed by state courts," unless Congress "add[s] any language limiting the breadth of that word." 520 U.S. at 5.

The Court then noted that, whereas the earlier sentence in the statute referring to the court of prosecution specified a federal court, the sentence in question did not: "Given that Congress expressly limited the phrase 'any crime' to only federal crimes, we find it significant that no similar restriction modifies the phrase 'any other term of imprisonment,' which appears only two sentences later and is at issue in this case." *Id.* The earlier phrase does not define "any crime," but instead limits its scope by adding the words "for which he may be prosecuted in a court of the United States."

***Brown* v. *Gardner*, 513 U.S. 115 (1994),** held that the Department of Veterans Affairs (VA) owed disability benefits to a veteran even though the VA was not at fault for the veteran's injury. The statute required the VA to compensate a veteran for an injury that is "not the result of such veteran's own willful misconduct." 38 U.S.C. 1151. The Court found it "obvious" from the text that the VA's liability is not contingent upon its fault by pointing to "the absence from the statutory language of so much as a word about fault on the part of the VA." 513 U.S. at 117.

The Court noted that the proper outcome "is made all the more obvious by the statute's express treatment of a claimant's fault. The same sentence of § 1151 * * * restricts compensation to those whose additional disability was not the result of their 'own willful misconduct.'" 513 U.S. at 120. The words "willful misconduct" in Section 1151 do not define a term but instead supply a fault element absent from the part of the sentence concerning the VA.

***General Motors Corp.* v. *United States*, 496 U.S. 530 (1990),** held that the Environmental Protection Agency was not required to review a revision of a state implementation plan (SIP) within four months of the revision's enactment. The EPA must act within "four months after the date required for submission of a plan," 42 U.S.C. 7410(a)(2), but the Court reasoned that this section "seems to us to refer only to the action required on the original SIP * * * [and thus] by its terms, therefore does not impose such a time restraint on EPA review of a SIP revision." 496 U.S. at 536.

The Court stated that the text of Section 7410(a)(2) "suffices to dispose of petitioner's contention, but if additional support is needed, it is available." 496 U.S. at 537. Specifically, another section of the statute decreed that "with respect to certain SIP revisions for fuel-burning stationary sources, 'the Administrator shall approve or disapprove *any revision* no later than three months after its submission.'" *Id.* (quoting 42 U.S.C. 7410(a)(3)(B) (emphasis added)). Section 7410(a)(3)(B) did not define a term also found in Section 7410(a)(2), but instead included a time limit with respect to revisions that Section 7410(a)(2) did not have. "Since the statutory language does not expressly impose a 4-month deadline and Congress expressly included other deadlines in the statute, it seems likely that Congress acted intentionally in omitting the 4-month deadline in [Section 7410(a)(2)]." *Id.* at 538.

***INS* v. *Cardoza-Fonseca*, 480 U.S. 421 (1987)**, held that an alien seeking asylum need not show that she faces a "clear probability of persecution" if she returns to her native country, but merely that she has a "well-founded fear" of such persecution. Congress had instructed the Attorney General to grant asylum to any "refugee" (8 U.S.C. 1158(a)) – *viz.*, to anyone who "is unable or unwilling to return to [his or her] * * * country because of persecution or a well-founded fear of persecution" (*id.* § 1101(a)(42)). A separate section authorized the withholding of deportation if an alien's "life or freedom would be threatened" by a return (*id.* § 1253(h)) – a standard the Court interpreted as requiring a "clear probability of persecution" (480 U.S. at 430). The Government argued that a "well-founded fear" can exist only if there is a "clear probability of persecution," and thus that the two standards were identical. *Id.* The Court rejected this contention because "the language Congress used to describe the two standards conveys very different meanings. * * * The linguistic difference between the words 'well-founded fear' and 'clear probability' may be as striking as that between a subjective and an objective frame of reference." *Id.* at 430-31 (internal quotation marks omitted).

The Court added: "The different emphasis of the two standards which is so clear on the face of the statute is significantly

highlighted by the fact that the same Congress simultaneously drafted [§ 1158(a)] and amended [§ 1253(h)]. In doing so, Congress chose to maintain the old standard in [§ 1253(h)], but to incorporate a different standard in [§ 1158(a)]." *Id.* at 432. Neither section defined a term from the other; they each simply provided their own standard.

***Duncan* v. *Walker*, 533 U.S. 167 (2001)**, held that an application for federal habeas corpus review does not toll the statute of limitations under AEDPA. The relevant statute provides: "The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection." 28 U.S.C. 2244(d)(2). The respondent argued that the words "or other collateral review" included federal habeas petitions, but the court rejected this argument: "Congress placed the word 'State' before 'post-conviction or other collateral review' without specifically naming any kind of 'Federal' review." 533 U.S. at 172.

The Court supplemented its reasoning by noting: "In several other portions of AEDPA, Congress specifically used both the words 'State' and 'Federal' to denote state and federal proceedings." *Id.* One such example was Section 2254(i): "'The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under Section 2254.'" *Id.* at 172-73. Section 2254(i) did not define any term, but merely highlighted Congress's failure in Section 2244(d)(2) to include a modifier that it had included in numerous other provisions. Moreover, "by providing a powerful incentive for litigants to exhaust all available state remedies before proceeding in the lower courts" (*id.* at 180), the construction of Section 2244(d)(2) advanced by petitioner and ultimately adopted by this Court advanced the states' interest in comity and finality.

***Hohn* v. *United States*, 524 U.S. 236 (1998)**, held that this Court had jurisdiction to review denials by the courts of appeals of applications for certificates of appealability. The relevant statute stated: "Cases in the courts of appeals may be reviewed by the Supreme Court by * * * writ of certiorari granted upon

the petition c[illegible]arty to any civi[illegible] or crimi[illegible] ca[illegible] before or after renditio[illegible]gment or decree." 28 U.[illegible](1). The Court ruled: "[illegible]n be little doubt that H[illegible] application for a certific[illegible] appealability constitutes [illegible] under § 2254[illegible]," bec[illegible]It is a proceeding seeking [illegible]or an immediate and r[illegible]ssible injury, *i.e.*, wrongful d[illegible]n in violation [illegible]ut[illegible]n." 524 U.S. at 241.

To "further refut[illegible]" the argument that it lacked [illegible]isdiction, the Court mentioned the merely "instructive" poin[illegible]hat "[t]he clear limit[illegible] this Court's jurisdiction to review de[illegible]ls of motions to file second or successive petitions by writ of certiorari contrasts with the absence of an analogous limitation to certiorari review of denials of applications for certificates of appealability." 524 U.S. at 249-50. The statute limiting second or successive petitions did not define the terms at issue; instead, it placed a direct restric[illegible]on on jurisdiction that was absent in a related statute. In fact[illegible]y refusing to apply the limiting principle articulated in Secti[illegible]2244(b)(3)(A) to bar this Court's jurisdiction in other cases, [illegible]*n* actually supports *petitioner's* contention (Pet. Br. 21) t[illegible]f anything – Congress's inclusion of the clause "by the con[illegible]ion of direct review or the [illegible]ion of the time for seeking [illegible]h review" was intended t[illegible]finality" for purposes of s[illegible]e post-conviction [illegible]e[illegible]le imposing no such limitation 'o[illegible]finality' fo[illegible]a 2255 para. 6(1).

Accordingly, there is no in[illegible]ce in wh[illegible]p-plied the *Russello* presu[illegible]s to this case.

C[illegible]

For the foregoing re[illegible]et forth in the opening brief of the p[illegible]rief for the United States, and the repl[illegible]es, the judgment of the court of ap[illegible]

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